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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO HOUSING AUTHORITY, RENAULT ROBINSON, JAMES THOMAS, GEORGE CRAMER, WILBERT ALLEN, BRENDA GAINES, and JOSEPH GARDNER,

Petitioners,

vs.

TRIAD ASSOCIATES, INC., d/b/a GUARDIAN SECURITY, JK GUARDIAN SECURITY, INC., and K & J MANAGEMENT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether corporations have racial identities entitling them to protection under the Equal Protection Clause and 42 U.S.C. Sec. 1985(3)?

2. Whether the provisions of 42 U.S.C. Sec. 1985(3) protect a class composed of "white corporations"?

3. Where a municipality's contract with a service provider expressly grants the public body discretion over the quantity, location and type of services to be purchased, does the municipality's exercise of that discretion amount to a "deprivation of property" sufficient to invoke the Due Process Clause's protections?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Chicago Housing Authority, Renault Robinson, James Thomas, George Cramer, Wilbert Allen, Brenda Gaines and Joseph Gardner respectfully petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was entered on December 26, 1989 and is reported at 892 F.2d 583 (7th Cir.

1989). The opinion is reproduced in the Appendix ("App.") at A-1 to A-28. By order dated February 15, 1990 defendants' motion for rehearing and rehearing *en banc* was denied (App. B-1 to B-3). The judgment of the district court, entered January 27, 1988, was not published (App. C-1 to C-15).

JURISDICTION

The judgment of the Court of Appeals on which this Petition is based was entered on December 26, 1989 (App. A). The defendants' motion for rehearing and rehearing *en banc* was denied on February 15, 1990 (App. B). By order dated May 3, 1990, this Court extended the time for filing a Petition for a Writ of Certiorari to June 25, 1990 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, which provide in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which

> shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This case involves Rev. Stat. Sec. 1980, 42 U.S.C. Sec. 1985(3), which provides in pertinent part:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a claim of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.[1]

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[1] 42 U.S.C. Sec. 1985(3) is "the surviving version of Sec. 2 of the Civil Rights Act of 1871." *Great American Fed. S. & L. Assn. v. Novotny*, 442 U.S. 366, 368.

STATEMENT OF THE CASE

A. Factual Background

For purposes of this petition, we accept the following description of the parties in the Seventh Circuit opinion below:

> Triad Associates, Inc., d/b/a Guardian Security, is an Illinois corporation in the business of providing security, investigative and alarm services. J.K. Guardian, also an Illinois corporation, is in the business of providing security services. K & J Management manages and operates both Triad and Guardian. James Malinowski and Kenneth Kotz, the owners of Triad and Guardian, are white males.*
>
> * Malinowski and Kotz have not filed suit in their individual capacities.

(App. A-3).[2]

Triad provided 100% of the Chicago Housing Authority's ("CHA") security services beginning in 1982. In 1986, CHA competitively bid its security work. Triad won the bulk of the work. A relatively small portion was given to two minority-owned corporations.

Triad filed this lawsuit against CHA, and certain of its former and current officials, alleging a campaign of political and racial harassment, stemming from the late Chicago Mayor Harold Washington's election and his appointment of Renault Robinson as Chairman of the CHA. Rob-

[2] Although not noted in the Seventh Circuit's statement, plaintiff K & J Management is also alleged by plaintiffs to be an Illinois corporation. (Amended Complaint, Para. 2) (App. E-2).

inson, together with the other individual defendants, according to Triad, undertook "a campaign to intimidate and to drive white employees and white contractors from the CHA and to replace them with black employees and black contractors who supported the political ambitions of defendant Robinson and the Washington Administration" (Par. 13 of Amended Complaint) (App. E-14). The alleged campaign lasted from 1983 through 1987 and is described at 892 F.2d at 585 (App. A-3 to A-4).

B. Proceedings In The District Court

Triad filed its amended complaint on June 15, 1987 raising claims brought under 42 U.S.C. Secs. 1983, 1985(3), 18 U.S.C. Sec. 1962 (RICO), as well as two pendent state claims (App. E). In the district court, the CHA defendants moved alternatively to dismiss the complaint for failure to state a claim and for summary judgment. The district court dismissed all five of Triad's federal claims and the two pendent state claims, never reaching the evidentiary materials submitted on summary judgment. In a subsequent Rule 11 proceeding, the district court, however, entered a sanctions order, in part, on grounds that much of the factual basis for Triad's claim was frivolous and Triad's attorney had not conducted a sufficient independent inquiry of the facts prior to filing. The sanctions decision is published at 688 F. Supp. 1277 (N.D. Ill. 1988).

C. Proceedings In The Court Of Appeals

On appeal, the Seventh Circuit affirmed the district court's dismissal of Triad's First Amendment political retaliation claim (Count I); Triad's due process claim (Count II)—except to the extent that the plaintiff alleged CHA, without cause, breached its 1986 security contract allegedly by transferring some of the work to minority firms (*see*,

Par. 15(e)-(h) of Amended Complaint) (App. E-7 to E-9); and Triad's RICO Claim (Count V). The panel, however, reversed the balance of the dismissal order, remanding what remains of the due process claim (Count II) and the race-based equal protection claim (Count III) for further review of their legal sufficiency, and sending the Sec. 1985(3) claim back for trial (without ruling on several alternative arguments CHA advanced in support of affirmance). The panel also refused to examine the summary judgment record, though CHA urged it to do so in accordance with *Otto v. Variable Annuity Life Ins.*, 814 F.2d 1127, 1137-38 (7th Cir. 1986), *cert. denied*, 486 U.S. 1026 (1988). The defendants' motion for rehearing and rehearing *en banc* was denied on February 15, 1990 (App. B).

REASONS FOR GRANTING WRIT

THE COURT OF APPEALS' DECISION ON IMPORTANT QUESTIONS OF FEDERAL LAW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS

I. INTRODUCTION

This case presents three important issues of federal law: (1) whether corporations have a racial identity entitling them to protection under the Equal Protection Clause and 42 U.S.C. Sec. 1985(3); (2) whether the protections of 42 U.S.C. Sec. 1985(3) extend to a class composed of "white corporations"; and (3) whether the Due Process Clause is implicated when a municipal entity exercises its contractual discretion to purchase fewer services from one of its public contractors. The Seventh Circuit decided the

issue of corporate racial identity in a manner that conflicts with this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), which held that a corporation has no racial identity. The Court of Appeals also held, as a matter of statutory construction, that Sec. 1985(3) protects "white corporations". This holding conflicts with *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), in which this Court held that expansion of Sec. 1985(3) beyond class based animus against Negroes and their supporters was highly questionable. Numerous circuit court decisions have followed *Scott*. Finally, the circuit court below decided the third issue of due process protection for breach of public service contracts in a manner that conflicts with the decisions of other circuit courts.

II. THIS COURT HAS CLEARLY STATED THAT CORPORATIONS DO NOT HAVE A RACIAL IDENTITY

This Court in *Arlington Heights*, 429 U.S. at 263, unequivocally stated, "As a corporation, MHDC [Metropolitan Housing Development Corporation] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." The circuit court below has chosen to disregard the Court's conclusion in *Arlington Heights* because it "was nothing more than dicta." 892 F.2d at 591 (App. A-14). The *Triad* court based its decision on two factors: (1) in *Arlington Heights*, the presence of an individual plaintiff having standing made it unnecessary for the Court to resolve the issue of whether a corporation could ever raise a claim of discrimination and thus the Court's pronouncement on the racial identity of corpora-

tions was non-binding,[3] and (2) the Court's subsequent decision in *Croson v. City of Richmond*, ____ U.S. ____, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), striking down a municipal Minority Business Utilization Plan requiring a minority business set-aside in pubic contracts.

The Seventh Circuit improperly disregarded this Court's pronouncement in *Arlington Heights* that corporations are without racial identity. Indeed, the Court's conclusion is hardly a novel proposition. In *Dartmouth College v. Woodward*, 17 U.S. 335, 408 (1819), Mr. Chief Justice Marshall described the limitations under federal law inherent in corporations:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

More recently, the Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 (1978), noted that corporations have more limited constitutional rights than individuals. The privilege against compulsory self-incrimination, *Wilson v. United States*, 221 U.S. 361, 382-386 (1911), and the right to privacy, *California Bankers Assn. v. Schultz*, 416 U.S. 21, 65-67 (1974), are " 'purely personal' guarantees" that this Court has determined "are unavailable to corporations and other organizations be-

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[3] To the extent that the Court has left the issue of the racial identity of corporations undecided for resolution in another case, this case now specifically raises this issue and certiorari should be granted to eliminate any uncertainty. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 495 (1981); *SEC v. United Benefit Life Insurance Co.*, 387 U.S. 202, 207 (1967).

cause the 'historic function' of the particular guarantee has been limited to the protection of individuals." 435 U.S. at 779 n.14.

Race, quite naturally, is a purely personal and immutable trait that has only been ascribed to individuals. The fact that individuals owning or controlling a corporation are predominantly of one race, outside the statutorily created set-aside programs discussed *infra* at 10-11, does not imbue a corporation with a racial identity. Indeed, under the theory of incorporation, a new legal entity results, distinct from its members, owning the corporate assets, assuming the corporate obligations and with perpetual existence. H. Henn and J. Alexander, Laws of Corporations 146 (3d ed. 1983). Plaintiff's allegations here might be colorable for a partnership which is not distinct from its members, but not for a corporation. *People By Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 41 (1982), *mod. on other grounds*, 718 F.2d 22 (2d Cir. 1982) ("A corporation is a distinct and fictional entity; a partnership is not distinct from its members at all").

Unlike individuals, a corporation's "race" under the Seventh Circuit's analysis cannot be an immutable characteristic. Given the volatility of the business world with mergers, take-overs and traditional sales of ownership, no certainty can exist as to the "racial" identity of any corporation based on the composition of its ownership. Perhaps then one should look to the composition of a corporation's employees. Triad alleges here that its "employees and supervisory staff is [sic] overwhelmingly black" (Par. 2 of Amended Complaint) (App. E-2). This would make the corporation black, not white. Alternatively, it may well be that customers or a company's location determine a corporation's racial identity. The folly of trying to identify a corporation's racial identity, merely as a matter of

common sense, is evident from these examples.[4] Logic and law dictate that corporations cannot have a racial identity, as this Court correctly concluded over a decade ago.

The second basis for the Seventh Circuit's conclusion that corporations have a racial identity is equally flawed. This Court's ruling in *Croson* is inapposite to the issue of corporate racial identity raised here. The plaintiff in *Croson* was a business that had obtained a municipal contract and could not meet the 30% minority set-aside requirement for all public contracts enacted by a City of Richmond ordinance. The constitutionality of this requirement was challenged by the business. No allegation was made in *Croson* that the business had a "white" racial identity, only that it was a corporation subject to the Minority Business Utilization Plan's set-aside requirement and that it would suffer the loss of its contract if it did not meet the set-aside requirement.[5] *Croson* is irrelevant to this case because no government enacted set-aside program is involved here which would provide a basis for the racial classification of corporations.

Certainly Congress[6] or the City of Chicago can constitutionally enact statutes that objectively identify minority

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[4] Indeed, what is the "race" of the CHA or the City of Chicago? Does it change with each election or appointment of top officials who are of a different race?

[5] Under the City of Richmond's ordinance, minority businesses, benefiting from the 30% set-aside requirement, were defined as businesses having a 51% ownership by persons who were Black, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts. 109 S. Ct. at 713.

[6] Federal statutes have similarly defined minority-owned or disadvantaged corporations for purposes of set-aside requirements in public contracting. *See*, Small Business Act, 15 U.S.C. Sec. 637(a)(4)-(12) (1988) and Public Works Employment Act, 42 U.S.C. Sec. 6705(f)(2) (1982).

controlled corporations, in order to eradicate the effects of past-discrimination against such corporations. Absent such legislative classification of corporations—*e.g.* along lines of race, sex or geography—there is nothing that tells us whether a corporation is white or black. Finally, the Seventh Circuit's assertion of racial identity for corporations opens a Pandora's box of other identity questions. If corporations can have racial traits, then no reason exists why they should not also have a sexual identity. And if sex discrimination is possible, then why not age discrimination or handicap discrimination, all based on the attributes of the corporate owners.[7]

III. THE PROTECTIONS OF 42 U.S.C. SEC. 1985(3) DO NOT EXTEND TO A CLASS COMPOSED OF "WHITE CORPORATIONS"

In ruling that the coverage of Sec. 1985(3)'s remedial scheme can be extended to encompass alleged conspiracies against white corporations, the Seventh Circuit stated that it was "addressing a previously undecided area of law."

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[7] The court below also relied on *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982), which similarly fails to support its corporate racial identity holding. In *Heimbach*, the court found, *inter alia*, that the plaintiff non-profit corporation was founded to produce theater productions which "particularly reach and involve the Black and Hispanic communities." 671 F.2d at 703. Where a corporation's purpose is to advance the interests of a particular class of persons, the court determined that it could assume the racial identity of such persons. *Id.* at 706. *See also, NAACP v. Button*, 371 U.S. 415, 443 (1963). The analysis contained in the other appellate court decision relied on below, *Marshall v. Kleppe*, 637 F.2d 1217 (5th Cir. 1980), is also flawed in that it imputes the racial identity of the corporation's officers or directors to the corporation. As explained above, such an interpretation is improper because a corporation is distinct from its members.

892 F.2d at 592 (App. A-17). The question of whether Sec. 1985(3) covers white corporations can be considered an undecided area of law, only if one disregards the implications of this Court's clear line of authority beginning with *Griffin v. Breckenridge*, 403 U.S. 88 (1971), including *Great American Federal S & L Assn. v. Novotny*, 442 U.S. 366 (1979), and concluding with *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983). In these cases the Court analyzed the statute and its legislative history, concluding that Congress in enacting Sec. 1985(3) had a narrow focus—to protect blacks and their supporters who faced the terror of the Ku Klux Klan following the Civil War. *Scott*, 463 U.S. at 834-37; *Griffin*, 403 U.S. at 96-102. In limiting the scope of Sec. 1985(3) in these cases, the Court specifically cautioned in *Scott* that "it is a close question whether Sec. 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause . . . ." 463 U.S. at 836.

The Seventh Circuit acknowledged that the predominant purpose of Sec. 1985(3) was to combat the prevalent animus against blacks and their supporters, as stated in *Scott*. Nevertheless, the court then announced that it will "go beyond this 'predominant purpose.' " 892 F.2d at 592-93 (App. A-18). In holding that Sec. 1985(3) protects white corporations, the appellate court has simply ignored this Court's analysis in *Scott* and the legislative history of Section 1985(3).[8] The *Scott* court reviewed the statute's

[8] Indeed, in adopting this holding the Seventh Circuit also disregards its own prior precedent. In *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985), the Seventh Circuit stated: "The import of both *Griffin* and *Scott* is that the legislative history of Section 1985(3) does not support extending the statute to include conspiracies other than these motivated by racial, class-based animus against 'Negroes and their supporters' ".

legislative history in detail to determine the intent of Congress in passing Section 1985(3). It concluded:

> We do not interpret these parts of the debates as asserting that the Klan had a general animus against labor or capital, or against people from other States as such. . . . The animus was against Negroes and their sympathizers, ...

463 U.S. at 838. For the appellate court to hold that Sec. 1985(3) now protects white corporations from conspiracies, turns the Court's analysis in *Scott* and congressional intent on its head. Far from protecting blacks from the actions of the Klan, the Seventh Circuit, by including white corporations among those groups protected by Section 1985(3), has actually made it possible for the current corporate incarnations of the Klan to be protected by Section 1985(3)'s provisions. Such a result is absurd and clearly was not the intent of Congress in passing the Ku Klux Klan Act.

The Seventh Circuit's expansive reading of Sec. 1985(3) to include white corporations is also in conflict with other Circuits. In *Wilhelm v. Continental Title Co.*, 720 F.2d 1173 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984), the court, in concluding that Section 1985 did not protect handicapped persons, stated:

> In summary as to the *Scott* opinion, we find nothing therein to give any encouragement whatever to extend Section 1985 to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned. In fact from *Scott* we get a signal that the classes covered by Section 1985 should not be extended beyond those already expressly provided by the Court.

720 F.2d at 1176. *See also, National Communication System v. Michigan Public Service Corporation*, 789 F.2d 370,

374 (6th Cir. 1986), *cert. denied*, 479 U.S. 852 (1986) (telephone companies not " 'discrete and insular' minorities" covered by Section 1985(3)).

The Fifth Circuit in *McLean v. International Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987), taking a somewhat more inclusive approach than the *Wilhelm* court, has expanded Section 1985(3) coverage to include, *inter alia*, classes characterized by "some inherited or immutable characteristic." *Id.* at 1219. *See also*, *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985) (Sec. 1985(3) class must possess the "discreet, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex); and *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 109 L.Ed.2d 532 (1990). Here, however, any racial identification that can be ascribed to a corporation is certainly not immutable but wholly dependent upon the changing complexion of its ownership. The Seventh Circuit's holding that Section 1985(3) covers "white corporations" conflicts not only with this Court's holdings but also with those of the many circuits considering the scope of Section 1985(3).

Finally, the Seventh Circuit acknowledged Justice Blackmun's admonition in *Scott* that "[d]etermining the scope of Sec. 1985(3) is a matter of statutory construction and has nothing to do with current interpretations of the First and Fourteenth Amendments," 463 U.S. at 841. The court below then proceeded to find that the scope of Sec. 1985(3) cannot be defined in a vacuum ignoring current Fourteenth Amendment jurisprudence, 892 F.2d at 593 (App. A-19), and used *Croson* to conclude that Sec. 1985(3) extended to white corporations. There can be no question that the determinant of the scope of coverage under Section 1985(3) is the intent of the 42nd Congress which

enacted it as part of the Ku Klux Klan Act of 1871. The Seventh Circuit cannot be permitted to simply ignore the exhaustive analysis of this provision's legislative history in *Griffin* and *Scott*, by essentially stating that modern constitutional theory negates the intent of Congress in passing this statute. The importance of this issue, as well as the conflict raised by this decision between the Seventh Circuit and the decisions of this Court and other Circuits, requires that certiorari be granted.

IV. WHERE A PUBLIC CONTRACT FOR SERVICES GIVES A MUNICIPALITY DISCRETION OVER THE QUANTITY, LOCATION AND TYPE OF SERVICES TO BE PURCHASED, THE MUNICIPALITY'S EXERCISE OF THAT DISCRETION CANNOT CONSTITUTE A "DEPRIVATION OF PROPERTY" SUFFICIENT TO TRIGGER THE DUE PROCESS CLAUSE'S PROTECTIONS

The due process claim presented by this case is whether CHA's decision to reduce the scope of security work given Triad—though permitted by the express terms of the governing contract—nonetheless presents a federal due process claim.[9] While the Seventh Circuit implicitly agreed that the language in the March 1986 services contract between CHA and Triad, providing that the CHA was not "obligated to obtain from [Triad] any particular amount, or any amount, of service," did not create the claim of

[9] The circuit court has stated that *Triad* was effectively terminated from performing further services under the contract, 892 F.2d at 589 n.6 (App. A-12), but that is not a fair or accurate characterization of the allegations of the complaint which assert CHA reduced the amount of work under the contract. (Amended Complaint, Pars. 15(f) and (h)) (App. E-8 to E-9).

entitlement necessary for a due process violation,[10] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), the court then proceeded to apply the Illinois doctrine of the implied duty of good faith in the performance of contracts to create a property right. 892 F.2d at 589 (App. A-11). The court's analysis is in conflict with the decisions of other Circuits rejecting the idea that every breach of a public contract is a deprivation of property within the meaning of the due process clause.[11] *S & D Maintenance, Inc. v. Goldin*, 844 F.2d 962, 966-67 (2d Cir. 1988); *Ramsey v. Board of Education of Whitley County*, 844 F.2d 1268, 1273 (6th Cir. 1988); *San Bernardino Physicians' Services Medical Group v. City of San Bernardino*, 825 F.2d 1404, 1408-09 (9th Cir. 1987); and *Jett v. Dallas Independent School District*, 798 F.2d 748, 754 n.3 (5th Cir. 1986), *mod. on other grounds*, ____ U.S. ____, 109 S.Ct. 2702 (1989). Where, as here, all that is alleged is a reduction in the number of hours Triad was paid under its contract (or the re-assignment of a few guard sites), the magnitude of the interest at stake and the security attached to the contractual right at issue are not—under the foregoing cases—sufficient to trigger due process.[12]

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[10] The critical provision of the contract says: "CHA reserves complete discretion to determine from time to time the quantity, location, deployment and type of services to be provided. CHA is not, by this Agreement, obligated to obtain from contractor any particular amount, or any amount, of services." (Article 3 of Exh. G to Amended Complaint).

[11] Indeed, the *Triad* decision is in conflict on this point with several prior Seventh Circuit decisions. *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 416-17 (7th Cir. 1988); *Illinois Psychological Association v. Falk*, 818 F.2d 1337, 1343-44 (7th Cir. 1987); and *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983).

[12] Though the claim is that CHA exercised its discretion in a racially offensive manner, that is irrelevant here. If a race claim exists at all, it is one that falls within the scope of the Equal Protection Clause.

The Seventh Circuit evidently believed that its requirement of a breach of the good faith performance in contracting doctrine does not open every public contract breach to a due process claim. However, the exception which the court has carved out will inevitably become the rule since most American jurisdictions recognize the implied duty to perform a contract in good faith.[13] One need not stretch the imagination to foresee standardized use of the allegation that good faith was violated by the breach of a public contract. And these claims will not be confined to government supplier contracts, but would also extend to public employment contracts. Under the Seventh Circuit's approach, in those circumstances where the court has found a public employer has discretion to discharge an employee, *e.g.* because no contract or limiting regulation exists, the employee is on probation or otherwise, the employee may allege that the employer's discretion was exercised in bad faith (based on the covenant of fair dealing)—forcing a trial, in every case, on the underlying motivation of the discharge, not simply whether procedural due process was extended. Contrary to its decision in *Brown*, the result of the Seventh Circuit's decision here is to "shift the whole of the public law of the states into the federal courts." 722 F.2d at 364.

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[13] Breach of Contract and The Common Law Duty to Perform In Good Faith, 94 Harv. L. Rev. 369, 404 (1980) (Listing 27 states with statutes requiring a duty of good faith in contract performance).

CONCLUSION

Wherefore, for all of the above reasons, petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-1353, 88-2830 and 88-2876

TRIAD ASSOCIATES, INC.
d/b/a GUARDIAN SECURITY,
J.K. GUARDIAN SECURITY SERVICES, INC.
and K & J MANAGEMENT, INC.,

Plaintiffs-Appellants,

v.

CHICAGO HOUSING AUTHORITY, RENAULT ROBINSON,
JAMES THOMAS, GEORGE CRAMER,
WILBERT ALLEN, BRENDA GAINES
and JOSEPH GARDNER,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 5096—**Charles P. Kocoras,** *Judge.*

ARGUED NOVEMBER 2, 1988—DECIDED DECEMBER 26, 1989

Before BAUER, *Chief Judge,* WOOD, JR., and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* In this consolidated appeal, plaintiffs below, Triad Associates, Inc., J.K. Guardian Security Services, Inc., and K & J Management, Inc., ("Triad" collectively), appeal the district court's grant of a motion to

dismiss their complaint in favor of defendants ("CHA" collectively).[1] Triad further appeals the district court's subsequent award of attorney's fees and sanctions under Rule 11 and 42 U.S.C. § 1988 with regard to Counts II and IV.

In its complaint, Triad alleged that the CHA had discriminated against Triad on the basis of race and political affiliation. Specifically, the complaint alleged violations of 42 U.S.C. § 1983, based on first, fifth, and fourteenth amendment rights, as well as a § 1985(3) claim and a civil RICO action. In support of these allegations, Triad claimed that the CHA engaged in a "campaign of harassment" designed to deter Triad's political support for opponents of the administration of the late Mayor Harold Washington. Triad further alleged that this "campaign of harassment" was racially motivated. The district court dismissed the complaint in its entirety under Federal Rule of Civil Procedure 12(b)(6).

Subsequently, the CHA motioned the district court to impose Rule 11 sanctions upon plaintiffs and/or to award attorney's fees under 42 U.S.C. § 1988. The CHA argued that Counts I thru IV were frivolous and not objectively warranted by existing law, that Triad failed to conduct a reasonable inquiry into the facts prior to filing suit, and that this litigation was pursued for an improper purpose. The district court ruled that Triad was subject to sanctions under Rule 11 and attorney's fees under § 1988 with respect to Counts II and IV. The CHA's motion with respect to Counts I and III was dismissed.

We affirm in part, reverse in part, and remand for further proceedings.

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[1] Triad brings this action against the Chicago Housing Authority and six named individuals in their individual capacities. Named as individual defendants are: Renault Robinson, Chairman of the CHA Board; James Thomas and Wilbert Allen, members of the CHA Legal Department; Joseph Gardner, Deputy Executive Director for Tenant Services; George Cramer, Deputy Executive Director of Finance and Administration; and Brenda Gaines, Executive Director of CHA since January, 1987.

I. FACTUAL BACKGROUND

Triad Associates, Inc., d/b/a Guardian Security, is an Illinois corporation in the business of providing security, investigative and alarm services. J.K. Guardian, also an Illinois corporation, is in the business of providing security services. K & J Management manages and operates both Triad and Guardian. James Malinowski and Kenneth Kotz, the owners of Triad and Guardian, are white males.[2]

The Chicago Housing Authority, a municipal corporation, provides housing for low income families within the City of Chicago. The CHA is governed by a seven-member Board of Commissioners appointed by the Mayor of the City of Chicago. At all times relevant to this appeal, Renault Robinson was the Chairman of the Board of Commissioners.

Triad first began providing security services for the CHA in 1982. After his appointment as Chairman of the CHA Board by the late Mayor Harold Washington, Robinson allegedly began a campaign, with the aid of the other named individual defendants, to intimidate, harass, and ultimately drive white employees and contractors from the ranks of the CHA and replace them with black employees and contractors who supported the political aspirations of Robinson and the Washington administration. The manifestation of this "campaign" most germane to the issues presented today is Triad's contention that Robinson enlisted the services of Digby Detective and Security Agency ("Digby") and GEJ Security, both black-owned companies who allegedly supported Robinson and the Washington administration, to replace Triad in its provision of security services for the CHA.

Triad's assertion that the CHA engaged in a "campaign of harassment" to further this politically and racially motivated scheme is based upon the following specific

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[2] Malinowski and Kotz have not filed suit in their individual capacities.

allegations: (1) with only two days notice, the CHA replaced Triad with Digby at the CHA's senior housing operations; (2) the CHA falsely maintained that Victor Vrdolyak (brother of Washington arch-rival Edward Vrdolyak) owned and controlled Triad's business; (3) without requiring the same of black-owned firms, the CHA subjected Triad to extensive audits and inspections in an effort to intimidate and embarrass; (4) in order to allow black-owned companies to qualify for certain CHA security contracts, the defendants blocked the award of a CHA contract to Triad by lowering the bid standards after Triad's bid had been recommended to the Board for approval; (5) the CHA awarded security contracts to black-owned companies although Triad tendered lower bids; (6) the CHA attempted to stop Triad from commencing performance on the contract it had been awarded by requiring the immediate posting of a performance bond, and proof of insurance, and refusing to confirm the contract's start dates while giving the black-owned companies written confirmations of their start dates; (8) the CHA assigned a service contract for the CHA headquarters to Digby even though Digby did not bid on the contract; (9) the CHA refused to make timely payments for services provided; and (10) the CHA reduced the amount of services Triad performed.

In Count I of its seven-count complaint, Triad maintained that the CHA's actions violated their rights of free association and speech as guaranteed by the first and fourteenth amendments and § 1983. In Count II, Triad alleged a violation of their due process rights as guaranteed by the fourteenth amendment and § 1983. In Count III, Triad alleged that the CHA's actions deprived them of the equal protection of the laws under the fourteenth amendment and § 1983. Count IV alleged a conspiracy on the part of the CHA to deprive Triad of rights guaranteed by the Constitution and laws of the United States in violation of § 1985(3). Count V is a civil RICO action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) and (d). In Counts VI and VII respectively,

Triad alleged tortious interference with contract and breach of contract under Illinois state law. The district court dismissed Counts I thru V with prejudice. Counts VI and VII were dismissed without prejudice.

II. ANALYSIS

The standard of review in determining the propriety of the grant of a motion to dismiss is well-established. As we stated in *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915, 107 S. Ct. 3188 (1987), all well-pleaded facts in the plaintiff's complaint must be taken as true. Moreover, as the Supreme Court admonished in *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974):

> When a federal court reviews a sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits. Thus, a motion to dismiss for a failure to state a claim can be granted only if it appears beyond doubt that the plaintiff could prove no set of facts entitling him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047, 106 S. Ct. 1265 (1986).

Counts I-III of Triad's amended complaint pray for relief under the provisions of 42 U.S.C. § 1983. Section 1983, however, does not by itself confer any substantive rights. Rather, it is a remedial provision to be employed only in the event of the deprivation of some right, privilege, or immunity guaranteed by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618, 99 S.

Ct. 1905, 1916 (1979). Thus, in order to withstand a motion to dismiss, Triad's complaint in Counts I-III must allege facts which, if believed, would show that the CHA was acting under color of state law and that its conduct deprived Triad of a right which was actually protected by the Constitution or laws of the United States. The district court dismissed all § 1983 Counts under this standard. We affirm with regard to Count I. With regard to the due process claim under Count II and the equal protection claim under Count III, however, we reverse and remand.

Count I: First Amendment Claim

In Count I of its amended complaint, Triad alleged that the CHA's conduct deprived them of their rights to free association and speech as guaranteed by the first amendment. Relying on this court's decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044, 104 S. Ct. 712 (1984), and a subsequent decision by the third circuit, *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986), the district court held that the first amendment does not prohibit a city's use of political criteria in awarding public contracts.[3] As such, the district court found that Triad had failed to state a claim entitling them to relief under § 1983 and dismissed that portion of the complaint.

Triad maintains that the district court's reliance on *LaFalce* and *Horn* was in error. Specifically, Triad argues

[3] Without deciding the issue, the district court assumed for purposes of ruling on CHA's motion that Triad was in fact engaged in activity protected by the first amendment. Specifically, the district court concluded that an inference could be drawn from the totality of the circumstances that Triad did not support the late Mayor Washington or his administration and that the alleged actions on the part of CHA were in retaliation for these political beliefs. In that we agree with the district court that the first amendment does not protect contractors in the awarding of public contracts, we do not address the propriety of this initial assumption.

that neither *LaFalce* nor *Horn* are applicable to the present circumstances in that Triad's circumstances are not those of an "unsuccessful bidder" as was the case in *LaFalce*, nor was Triad terminated from its contract solely as a result of the partisan effect of a change in the administration as in *Horn*. Moreover, Triad argues that neither of those cases involved the "campaign of harassment" to which Triad was allegedly subjected. In the alternative, Triad urges this court to reevaluate and overturn its decision in *LaFalce* in light of the Supreme Court precedent in *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980), wherein the Court held that non-policymaking, non-confidential public employees could not be discharged or threatened solely upon the ground of political belief.

We reject Triad's contention that the factual distinctions between this case and *LaFalce* and *Horn* mandate a different resolution of the first amendment issue. In *LaFalce*, this court held that the first amendment did not protect a contractor whose bid for a public contract was rejected solely because the owners of the business were not political supporters of the mayor. 712 F.2d at 293-94. This conclusion was premised, in large part, on a cognizable distinction between the first amendment associational interests of "independent contractors" and "public employees" in this context. In his thoughtful opinion for the court, Judge Posner weighed the costs of further subjecting this country's long-established patronage system to first amendment scrutiny against the benefits to a contractor's exercise of first amendment rights and concluded that, in the case of contractors, the costs outweighed the benefits. Judge Posner was also cognizant of the narrow application which the Supreme Court intended for the principles announced in *Elrod* and *Branti*.[4] *See Fox & Co. v. Schoemehl*, 671 F.2d 303, 304-05 (8th Cir. 1982). Based

[4] As the Court stated in *Elrod*, "[a]lthough political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing *public employees* for partisan reasons." 427 U.S. at 353, 96 S. Ct. at 2680 (emphasis added).

upon all of these factors, we declined to extend the protection granted in the *Elrod-Branti* line of cases to independent contractors.

Likewise, in *Horn v. Kean*, the third circuit held that independent contractors who had been replaced by the new state administration could not rely on the first amendment as a remedy for those dismissals. Concluding that the *Elrod-Branti* line of cases regarding discharge of public employees for partisan political reasons do not apply to independent contractors, the court ruled that the plaintiffs enjoyed no first amendment protection. *Horn*, 796 F.2d at 675-77.

While it is true that the instant case is not factually parallel to the circumstances that were presented for review in *LaFalce* and *Horn*, the rationales underlying those decisions instruct that the differences that do exist are not such that a differing result is mandated. Triad's business relationship vis-a-vis the City of Chicago is unquestionably one of an "independent contractor."[5] The deci-

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[5] Triad maintains that they had an ongoing business relationship with the CHA for over five years. In addition, Triad argues that they had a written agreement with the CHA which they were performing with a high degree of professionalism. Furthermore, unlike the situation in *Horn*, Triad points out that the allegedly discriminatory acts of the CHA were not immediately preceded by a change in the administration but, rather, occurred much later. These facts, however, do not alter the fact that Triad is an "independent contractor" and not a "public employee."

In this regard, Triad argues that it has not simply been denied a contract or refused the opportunity to do business with the city. Rather, Triad argues that, like the plaintiff in *LaPinski v. Dietrich*, 578 F. Supp. 235 (N.D. Ind. 1984), it had an existing benefit—a contract for services—that was taken away by the CHA. Regardless of this assertion, however, the fact remains that Triad is an "independent contractor." In light of this fact, the rationale underlying our decision in *LaFalce* and the third circuit's decision in *Horn* governs. *See also Fox & Co. v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982) (City auditors/independent contractors who were dismissed from their employment based on political reasons were not protected from dismissal under the first amendment); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied*, 459 U.S. 878, 103 S. Ct. 174 (1982).

sions in both *LaFalce* and *Horn* were grounded upon the distinction between "independent contractors" and "public employees" and the extent to which this distinction was dispositive of the first amendment issue. In that Triad is an "independent contractor", we hold that our decision in *LaFalce* is binding and that Triad is not protected under the first amendment in this context.

Alternatively, Triad asks that we reevaluate and overturn our decision in *LaFalce*. We decline to accept this invitation. As was noted in *LaFalce*, "[s]ome day the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough differences in the strength of the competing interests in the two classes of cases to persuade us not to attempt to do so." 712 F.2d at 295. In like manner, the third circuit in *Horn* stated, "[a]s the force of a first amendment assault on state patronage practices moves from public employment into the outer spheres of political life, we are extremely hesitant to realign radically, in the name of the Constitution, a political constellation that has been with us since the Republic was formed." 796 F.2d at 677. Thus, to the extent the protection granted to public employees under the *Elrod-Branti* line of cases may be extended to contractors, we leave that extension to the Supreme Court. *Cf. Rutan v. Republican Party of Illinois*, 868 F.2d 943 (7th Cir. 1989), cert. granted, ____ U.S. ____, 110 S. Ct. 48 (1989).

Count II: Due Process

In Count II of its complaint, Triad alleged that various actions on the part of the CHA denied them due process of the law as guaranteed by the fourteenth amendment. Specifically, Triad alleged that the CHA's alleged breach of a March, 1986 service contract and the subsequent transfer of the work provided for therein to other firms, without cause or a hearing, denied them of their due process rights. Additionally, Triad alleged that the CHA's alteration of the bidding requirements for a 1985 public works contract, for which Triad had successfully bid and

been recommended, deprived them of their due process rights. Concluding that Triad had not alleged a constitutionally protected property interest in either allegation, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972), the district court dismissed Triad's due process claim.

In order to support a claim for a violation of due process, Triad must show that it had a protectible property or liberty interest that was taken away by the CHA without a hearing. *Miller v. Henman*, 804 F.2d 421 (7th Cir. 1986), *cert. denied*, 484 U.S. 844, 108 S. Ct. 136 (1987). Moreover, this property interest must be more than a unilateral expectation—it must be a legitimate claim of entitlement. *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709; *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987), *cert. dismissed*, ____ U.S. ____, 108 S. Ct. 1101 (1988). Finally, "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709; *Perry v. Sindermann*, 408 U.S. 593, 604, 92 S. Ct. 2717, 2717 (1972) (Burger, C.J., concurring).

Confronted with this precedent, Triad initially argued that the CHA's alleged breach of the March, 1986 services contract and the subsequent award of those services to other firms constituted a denial of due process. The CHA pointed out, however, that under Article Three of the contract in question the CHA is given:

> complete discretion to determine from time to time the quantity, location, deployment and type of services to be provided. *CHA is not, by this Agreement, obligated to obtain from Contractor any particular amount, or any amount, of service.* (emphasis added).

Thus, the CHA argued, and the district court agreed, that there was no deprivation of any property rights that were secured by the contract.

Triad argues, however, that regardless of the discretion given to the CHA in Article Three of the contract, the CHA's

termination of the contract was a violation of certain implied rights that were secured by the contract. In support of this argument, Triad points out that Illinois law imposes upon all parties to contracts a duty of good faith in the performance of those contracts. *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983). Based on this precedent, Triad argues that the CHA's politically and racially-motivated termination of the existing contract was "arbitrary and capricious" and, as such, actionable bad faith. *Foster Enterprises v. Germania Federal Savings & Loan Ass'n*, 97 Ill.App.3d 22, 30, 421 N.E.2d 1375, 1381 (Ill.App. 3 Dist. 1981). In light of this argument, we believe that Triad may have been deprived of a "property interest" as that term has been defined under Illinois law.

It is a general principle of Illinois contract law that a covenant of fair dealing and good faith is implied into every contract absent express disavowal. *Dayan v. McDonald's Corp.*, 125 Ill.App.3d 972, ____, 466 N.E.2d 958, 971 (Ill.App. 1 Dist. 1984); *Foster*, 97 Ill.App.3d at 28, 421 N.E.2d at 1380; *Martindell v. Lake Shore National Bank*, 15 Ill.2d 272, 286, 154 N.E.2d 683, 690 (1958). Under Illinois law, "[t]he concept of 'good faith' has its most natural and common application to the situation where one party exercises discretionary authority in a manner that effects the rights and duties of the other party." *Rao*, 718 F.2d at 223; *Foster*, 97 Ill.App.3d at ____, 421 N.E.2d at 1381. In line with this principle, Illinois courts have recognized that "[g]ood faith between contracting parties requires that a party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously." *Id.*; *see also Dayan*, 125 Ill.App.3d at ____, 466 N.E.2d at 170 (where a party acts with improper motive . . . that party is exercising contractual discretion in a manner inconsistent with the reasonable expectations of the parties and therefore is acting in bad faith). Finally, this circuit has recognized that "an employee fired in breach of contract has been deprived of a legally protected interest [recognized] to be property under the Fourteenth Amendment." *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983).

In the case at bar, Triad has alleged that the CHA's termination of their 1986 contract, although facially permitted by the discretion granted the CHA by the express terms of the contract, was improperly motivated by racial and political considerations. Taking these allegations as true, as must be done in reviewing the propriety of the district court's grant of the CHA's motion to dismiss, and applying them to the legal precedent discussed above, we conclude that the CHA's actions in this case may have constituted "actionable bad faith"—i.e., a breach of the contract—and Triad may thereby have been deprived of a "property interest" under Illinois contract law.[6]

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[6] To clarify our position, we think it necessary to make two observations. Initially, we note that our decision in *Szabo Food Services, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, ____ U.S. ____, 108 S. Ct. 1101 (1988), is not dispositive of the issue presented today. The factual situation ruled upon by this court in *Szabo* is different from that presented today in one very important respect. In *Szabo*, the due process claim was not tied to any existing contractual right. Szabo's contractual rights had expired and they were presenting their claim only as a "disappointed bidder" for a new contract. As such, they could not make any claim to an entitlement to a contractual duty of good faith. Triad, on the other hand, was a party to the March, 1986 contract and was effectively terminated from performing further services under that contract. This fact, we believe, distinguishes these circumstances from those presented in *Szabo* and, together with Triad's unique "duty of good faith" argument, makes this issue appropriate for full adjudication.

Second, and perhaps more significant, we think it important to point out that our decision today is necessarily limited to situations in which the applicable state law implies a "duty of good faith" into the contract to which the state is a party. As was noted by the Court in *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709, "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . " In that Illinois state law does imply such a duty, the facts presented fall into that category of cases appropriate for "due process" adjudication. It follows, however, that our decision today does not impose due process restrictions in situations where the state law in question does not provide for an "implied duty of good faith" in the performance of contracts. *Cf. Ford Motor Credit Co. v. Garner*, 688 F. Supp. 435 (N.D. Ind. 1988) (Indiana law does not imply a duty of good faith into all contracts).

This determination, however, does not resolve the issue. In *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981), the Supreme Court held that there is more to establishing a violation of the Due Process Clause of the fourteenth amendment than merely showing a deprivation of property at the hands of a person acting under the color of state law. In so holding, the Court noted, "[t]he Fourteenth Amendment protects only against deprivations 'without due process of law.' " *Id.* at 537, 101 S. Ct. at 1914. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148 (1982); *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984); *Easter House v. Felder*, 879 F.2d 1458 (7th Cir. 1989) (en banc), *petition for cert. filed*, 58 U.S.L.W. 3291 (Oct. 10, 1989). The import of the Court's decision in *Parratt* was a recognition that post-deprivation remedies made available by a state can, under certain circumstances, satisfy the requirements of procedural due process. The Court opined that if this were not the case, "every alleged injury which may have been inflicted under the 'color of law' [would be converted] into a violation of the Fourteenth Amendment under § 1983." *Parratt*, 451 U.S. at 544, 101 S. Ct. at 1917.

Without purporting to decide the issue, we believe that the facts and issues presented in Count II of Triad's amended complaint may place it in that category of cases in which the remedies available to Triad under state contract law preclude a finding of a violation of the fourteenth amendment. As we noted in *Easter House*, "when alternative relief exists and the facts of a case dictate the application of *Parratt* and *Hudson*, a plaintiff's due process rights are not violated and no basis for a section 1983 action exists." 879 F.2d at 1476. Accordingly, we remand this issue to the district court for full consideration consistent with this opinion.[7]

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[7] With regard to Triad's allegation that they were denied due process by the CHA's after-the-fact alteration of the bidding requirements for a 1985 service contract, the district court concluded that Triad had failed to allege a protectible property interest. Rely-

(Footnote continued on following page)

Count III: Equal Protection

In Count III of its amended complaint, Triad argued that the CHA's actions constituted a violation of their equal protection rights as guaranteed by the fourteenth amendment and § 1983. Specifically, Triad identified two companies similarly situated with Triad, Digby Security and GEJ Security, and argued that these two companies received differential treatment in a number of respects based solely on their support of political allies of the CHA and their racial identity. Relying on dicta from *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977), the district court concluded that corporations cannot have a "racial identity" as is required under the equal protection clause to state a claim for discriminatory purpose, and consequently, dismissed Triad's claim.

The district court's determination that corporations such as Triad cannot properly allege a "discriminatory purpose" to support a claim under the equal protection clause was premised upon the following language from *Arlington Heights*, *id.* at 263, 97 S. Ct. at 562:

> As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioner's alleged discrimination.

The district court's conclusion, however, fails to recognize that this language from the Court's decision was nothing more than dicta. In that an individual plaintiff had standing to bring the equal protection claim in *Arlington Heights*, the Court did not resolve the issue of a corporation's stand-

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[7] *continued*

ing on our decision in *Szabo*, the district court held that "a disappointed bidder for a contract in Illinois lacks a property interest." In that Triad's allegations with regard to this portion of their due process claim present a "disappointed bidder" argument, we agree that our decision in *Szabo* governs and affirm the district court's dismissal of this portion of Triad's Count II allegation.

ing to raise a claim of racial discrimination. *Id.* at 264, 97 S. Ct. at 562 n.9. The lower court's determination also fails to take cognizance of post-*Arlington Heights* decisions from various circuits which, in the absence of a definitive ruling from the Supreme Court on this issue, have held that a corporation may have standing to allege racial discrimination. *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, ____ U.S. ____, 109 S. Ct. 706 (1989) (equal protection challenge to Minority Business Utilization Plan mandating a 30% set aside to minority businesses in public contracts); *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980) (private cause of action alleging civil rights violation under the fifth amendment may be raised by corporation); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir.), *cert. denied*, 459 U.S. 857, 103 S. Ct. 127 (1982) (corporation has standing to assert claims of racial discrimination under the equal protection clause); *Organization of Minority Vendors v. Illinois Central Gulf R.R.*, 579 F. Supp. 574, 589 (N.D. Ill. 1983). *See generally*, Note, *Corporate Standing to Allege Race Discrimination in Civil Rights Actions*, 69 Va. L. Rev. 1153 (1983).

In that the district court dismissed Count III of Triad's amended complaint without properly considering the implications which this precedent might have on the ability of Triad to support their equal protection claim, we reverse and remand for consideration in light of this precedent.

Count IV: Section 1985(3)

Under 42 U.S.C. § 1985(3), a plaintiff must allege four elements to make out a valid cause of action:

(1) a conspiracy;
(2) a purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

(3) an act in furtherance of the conspiracy, and;
(4) an injury to his person or property or a deprivation of any right or privilege of a citizen of the United States.

United B'hood of Carpenters & Joiners of America v. Scott, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 3355-56 (1983); *Grimes v. Smith*, 776 F.2d 1359, 1363 (7th Cir. 1985). In dismissing Triad's complaint, the district court held that Triad could not satisfy the second requirement.[8] Relying on this court's decision in *Grimes*, the district court held that the second requirement could only be satisfied by alleging a "racial, class-based animus against 'Negroes and their supporters.' " Moreover, the district court stated that, even if Triad could allege a racial identity, their claim under § 1985(3) would be dismissed because § 1985(3) does not protect "white corporations."

In Count IV of its amended complaint, Triad alleged that the CHA's actions constituted a conspiracy that deprived them of their rights not to be discriminated against on the basis of race as guaranteed by the fourteenth amendment and to free association as guaranteed by the first amendment. Thus, the import of Triad's allegation was that they were the victims not only of a racially-motivated conspiracy, but also one that was politically-motivated. Triad argues that these allegations are recognized as being within the potential scope of § 1985(3) by this court's decisions in *Grimes* and *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988). We agree and remand to the district court for further proceedings.

In *Grimes*, this court held that an allegation of a "wholly nonracial, but politically motivated" conspiracy was not cognizable under § 1985(3). In so holding, however, we expressly noted that conspiracies animated by *both* racial and political motives were still within the scope of § 1985(3)'s coverage. 776 F.2d at 1366 n.12; *see also*

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[8] In that the district court limited its ruling to this aspect of the § 1985(3) claim, we will limit our consideration in like manner.

Quinones v. Szorc, 771 F.2d 289, 291-92 (7th Cir. 1985). In its amended complaint, Triad has alleged a conspiracy motivated by both political and racial animus. Thus, on its surface, Triad's complaint appears to fall within that class of cases cognizable under § 1985(3). Triad's allegation is unique, however, in that its "racial animus" component asks this court to recognize a claim under § 1985(3) which has not been affirmatively ruled upon by any court to date. Specifically, Triad's claim raises the question of whether the coverage of § 1985(3)'s remedial scheme can be extended to encompass alleged conspiracies against whites. We believe that it can.

The parameters of the remedial provisions of § 1985(3) have been addressed in a variety of circumstances. *See generally, Scott*, 463 U.S. 825, 836-37, 103 S. Ct. 3352, 3360 (1983) (Court refused to extend coverage of § 1985(3) to conspiracies motivated by economic or commercial animus); *Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790 (1971) (While holding that § 1985(3) covered private conspiracies, Court reserved comment on question of § 1985(3)'s applicability to non-racial classes); *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985) (Handicapped persons are not included in coverage of § 1985(3)); *Grimes v. Smith*, 776 F.2d 1359, 1365-66 (7th Cir. 1985) (Court declined to extend the coverage of § 1985(3) to purely non-racial, politically-motivated conspiracies); *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988) (Coverage of § 1985(3) extends to encompass purely politically-motivated conspiracies). In *Scott*, the Court stated, "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." 463 U.S. at 836, 103 S. Ct. at 3360. Although not dispositive of the issue presented to this court in *Grimes*, this court briefly alluded to the parameters of § 1985(3)'s coverage. 776 F.2d at 765-66. In neither of these cases, however, was the issue affirmatively addressed and resolved. Thus, while we are addressing a previously undecided area of law, we are by no means writing on a clean slate.

Section 1985(3) provides, in pertinent part:

> If two or more persons . . . conspire or go in disguise on the highway . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages. . . .

In evaluating the viability of various claims under this language, the Supreme Court has required that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." *Griffin*, 403 U.S. at 102, 91 S. Ct. at 1798. The Court has gone further in this context to state, "[t]he conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.* *See also Scott*, 463 U.S. at 835, 103 S. Ct. at 3359. Thus, our task is to determine whether a conspiracy allegedly aimed against whites is "racial" within the context of § 1985(3) as that provision has been interpreted by the Supreme Court.

Section 1985(3) was originally enacted as part of § 2 of the "Ku Klux Klan Act of 1871."[9] In light of this fact, it cannot be doubted that the predominant purpose of the legislature in passing this Act was to combat the prevalent animus against Blacks and their supporters in the South during the Reconstruction Era. *See generally Scott*, 463 U.S. at 836-38, 103 S. Ct. at 3360-61; *Grimes*, 776 F.2d at 1363-66. In holding as we do today, however, we go beyond this "predominant purpose."

In his dissent in *Scott*, Justice Blackmun stated, "[d]etermining the scope of § 1985(3) is a matter of statutory construction and has nothing to do with current interpretations of the First or Fourteenth Amendments." 463 U.S.

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[9] The Act was originally known as "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." Act of April 20, 1871, ch. 22, 17 Stat. 13.

at 841, 103 S. Ct. at 3362 n.3. While we agree with his conclusion, we respectfully suggest that determinations as to the scope of § 1985(3) should not be made in a vacuum independent of considerations surrounding current fourteenth amendment jurisprudence. In conformity with this philosophy, we begin by focusing on the statutory language of § 1985(3).

In the enumeration of those persons encompassed within its protection, § 1985(3) expressly states "any person or class of persons. . . ." As was pointed out by Justice Stewart in *Griffin*, "[t]he approach of this Court to other Reconstruction civil rights statutes . . . has been to 'accord [them] a sweep as broad as [their] language.' " 403 U.S. at 97, 91 S. Ct. at 1796 (citing *United States v. Price*, 383 U.S. 787, 801, 86 S. Ct. 1152, 1160 (1966)). Under this rationale, § 1985(3)'s protection would clearly extend to white persons and whites as a class of persons. This conclusion is at least tangentially supported by recent interpretations of the language of § 1985(3) by the Supreme Court. In *Scott*, the Court stated, "[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 463 U.S. at 835, 103 S. Ct. at 3359 (quoting *Griffin*, 403 U.S. at 102, 91 S. Ct. at 1798) (emphasis in original). While the Court has never held that this language was meant to encompass more than animus directed against blacks, this is a logical interpretation of the Court's language. Indeed, an expansion of the protection granted by this language to groups other than blacks has already been undertaken by this court.

In *Quinones*, this court held that the remedial provisions of § 1985(3) extended to cover allegations of a "racially and politically motivated conspiracy" as advanced by an Hispanic. Clearly, discrimination against an Hispanic was no more in the mind of Congress in 1871 than was discrimination against whites. This fact, however, did not limit the extent to which we were willing to apply the

remedial provisions of § 1985(3) in an attempt to end all forms of racial discrimination. In like manner, the fact that discrimination against whites was not the primary concern of the 42d Congress in 1871 should not deprive whites from receiving the protections of § 1985(3) expressly granted to "any person or class of persons." Thus, we conclude, based on the statutory language of § 1985(3) and the interpretations given to that language by both the Supreme Court and this court, that allegations of a conspiracy motivated by a racial animus against whites are cognizable under § 1985(3).

As a final matter, we note that our construction of § 1985(3), although not governed by fourteenth amendment jurisprudence, is also not rendered in a vacuum completely independent of its teachings. One cannot read these two provisions without noticing the similarities in their texts. *See Griffin*, 403 U.S. at 97-98, 91 S. Ct. at 1795; *Scott*, 463 U.S. at 832, 103 S. Ct. at 3358. In an attempt to provide continuity in the guarantee of "equal protection of the laws" as it is provided for by the Constitution and by this Act of Congress, we look to fourteenth amendment jurisprudence as a guide to our decision today.

In *City of Richmond v. J.A. Croson Co.*, ____ U.S. ____, 109 S. Ct. 706 (1989), the Court affirmed the decision of the Fourth Circuit holding that the City of Richmond's minority set-aside program was unconstitutional under the fourteenth amendment. In a portion of the opinion representing a plurality of four justices, Justice O'Connor reiterated the view expressed by Justice Powell in *University of California Regents v. Bakke* stating, " '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.' " *Croson*, ____ U.S. at ____, 109 S. Ct. at 721 (quoting *Bakke*, 438 U.S. at 289-90, 98 S. Ct. at 2748). This fundamental principle of fourteenth amendment jurisprudence is instructive in our decision today. Though we are not bound by its precedent in our interpretation of § 1985(3), we are persuaded by its logic.

For the foregoing reasons, we conclude that the remedial provisions of § 1985(3) do cover conspiracies motivated by a racial animus towards whites and remand this issue to the district court for consideration in light of this opinion.

Count V: Civil RICO

In Count V of its amended complaint, Triad alleged that the activities of the CHA during the period between January, 1985, and April, 1987, constituted a pattern of racketeering activity in violation of §§ 1962(c) and 1962(d) of the civil RICO statute. Specifically, Triad alleged that the defendants committed acts of mail and wire fraud by falsely inducing Triad to bid for and provide security services when the CHA did not in fact intend to award Triad the service contracts or evaluate and rate Triad's performance according to their proposals and experience. The district court dismissed Triad's RICO claim ruling that Triad did not have standing to assert such a claim in that they could not allege an injury to their business or property which was proximately caused by the CHA's alleged racketeering activity. 18 U.S.C. § 1964(c). We affirm the district court's dismissal of Triad's civil RICO claim. Our affirmance, however, is premised upon grounds different from those relied upon below.

The district court's dismissal of Triad's RICO claim was based primarily on the conclusion that the contract in question between the CHA and Triad—i.e. the March, 1986 contract—reserved to the CHA the right to do all of the acts complained of by Triad as allegedly causing the injury suffered. Relying on *Robinson v. City of Chicago*, 656 F. Supp. 555 (N.D. Ill 1987), the district court concluded that a disappointed bidder such as Triad could not allege an injury sufficient to support a civil RICO action. In light of our earlier conclusion that the CHA had an obligation under Illinois law to exercise its contractual discretion in "good faith" and that this obligation may have been breached under these facts, we are reluctant

to conclude that Triad has not alleged a sufficient injury under the civil RICO statute. We need not address that issue, however, in that we conclude that Triad's RICO claim fails for a separate fundamental reason to state a claim upon which relief can be granted. Specifically, we find merit in the CHA's argument that Triad's claim fails to allege a "sufficient pattern of racketeering activity" under this court's civil RICO precedent.

Triad's claim in Count V is brought pursuant to 18 U.S.C. §§ 1962(c) and (d). These provisions provide, in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.
>
> . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

As we noted in *Elliot v. Chicago Motor Club Ins.*, 809 F.2d 347, 349 (7th Cir. 1986), "[a] crucial element of a section 1962 claim . . . is the existence of a pattern of racketeering activity." Ever since the Supreme Court narrowed its interpretation of the "pattern" requirement in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 n.14 (1985), this court has struggled to determine exactly what constitutes a "pattern of racketeering activity" sufficient to support a § 1962 claim. *See generally Jones v. Lampe*, 845 F.2d 755, 756 & n.4 (7th Cir. 1988) (list of cases dealing precisely with this issue). The guidelines which have precipitated from these decisions for courts to consider in evaluating the sufficiency of a § 1962 claim, however, militate against a conclusion that Triad's claim satisfies the pleading requirements of § 1962.

In *Sedima*, the Court noted in discussing the definition of a "pattern of racketeering activity" that, "[t]he infiltra-

tion of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." *Sedima*, 473 U.S. at 496, 105 S. Ct. at 3285 n.14. Focusing on the "continuity plus relationship" requirement espoused by the Supreme Court, this court has stated that a determination as to whether a "pattern of racketeering activity" exists in any given situation is a fact-specific question hinging on a variety of relevant factors. *Jones*, 845 F.2d at 757. Specifically, we have held that four factors should be considered in making this determination. These factors are: (1) the number and variety of the predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and, (4) the occurrence of distinct injuries. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304 (7th Cir. 1987) (citing *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986)). Finally, in *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), we held that a single fraudulent scheme with only one injury to one victim was not a "pattern of racketeering activity" under § 1962(c) simply because it required several acts of mail and wire fraud to inflict the single injury. In so holding, we stated:

> Mail fraud and wire fraud are perhaps unique among the various sorts of "racketeering activity" possible under RICO in that the existence of a multiplicity of predicate acts . . . may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a 'pattern' of racketeering activity.

Lipin, 803 F.2d at 325; *see also Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278-79 (7th Cir. 1989); *Tellis v. United States Fidelity & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1986) (multiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the neces-

sary pattern). It is under this precedent that Triad's present RICO allegation fails.

Triad alleges that the CHA and the individually-named defendants have "repeatedly used the United States mail and interstate telephone wires in furtherance of a scheme to defraud plaintiffs out of money. . . ." Triad points specifically to six "predicate acts" of mail fraud. Two were in the form of "Requests for Proposals" for guard services on January 11, 1985, and April 23, 1985. One was a letter sent from defendant Allen to Triad on March 14, 1986, giving Triad "a three day deadline . . . to execute the altered protective service contract." Three instances of the alleged mail fraud surrounded the termination of Triad from its performance of services under a portion of the 1986 contract. First, Triad points to a letter dated August 22, 1986, notifying Triad to terminate their services at certain family housing locations. Second, Triad points to a letter dated September 10, 1986, threatening Triad with termination of the contract unless they produced proof of a properly executed bond and proof of insurance by September 18, 1986. Finally, Triad points to a letter dated December 1, 1986, wherein the CHA notified plaintiffs that their "security personnel be pulled from CHA's Central Office." Likewise, Triad points specifically to five "predicate acts" of wire fraud. The first such act was a phone call on February 26, 1986, by which defendant Allen "fraudulently represented that GEJ and Digby had executed and were in full compliance with the CHA protective service contract requirements." Second, Triad points to three calls, on February 16th, 20th, and 23rd, whereby CHA made "numerous false assurances . . . that past due invoices . . . would be paid. . . ." Finally, Triad points to a call on April 27, 1987, whereby the CHA contacted plaintiffs and instructed them to reduce the daily number of guards providing security throughout family housing.

These allegations comprise the heart of Triad's civil RICO claim. As in *Jones*, however, these allegations do not allege a "pattern of racketeering activity" sufficient

to support a § 1962(c) claim. Triad alleges only one general scheme—i.e., that of ousting Triad from the provision of security services and replacing them with GEJ and Digby. All of this alleged activity surrounds two transactions, only one of which actually came to fruition—i.e., the March, 1986 contract between Triad and the CHA. Triad alleges only one victim—i.e., themselves. Finally, Triad alleges only one type of injury—i.e., their failure to secure and retain all of the business to which they claim an entitlement under the 1986 contract. These allegations, though by no means condoned in a general sense, do not support a "pattern of racketeering activity" sufficient to support a federal RICO case. *See Jones*, 845 F.2d 755 (7th Cir. 1988); *Medical Emergency Serv. Assocs. v. Foulke*, 844 F.2d 391 (7th Cir. 1988).

For the foregoing reasons, we affirm the district court's dismissal of Count V of Triad's amended complaint.

Attorney's Fees

Upon motion by the CHA, the district court below granted attorney's fees and sanctions under 42 U.S.C. § 1988 and Rule 11 on Counts II and IV of Triad's amended complaint. Specifically, the district court found that Counts II and IV were "frivolous and not warranted by the law" in violation of both § 1988 and Rule 11. Moreover, the district court concluded that Triad and its attorneys violated Rule 11 by failing to conduct an independent investigation into the factual allegations contained in Paragraphs 15(d) and (e) of the amended complaint. We affirm in part and reverse and remand in part.

Initially, we address the propriety of the district court's award of attorney's fees under § 1988. The very text of § 1988 states that "the court, in its discretion, may allow *the prevailing party* . . . reasonable attorney's fee as part of the costs." *See Szabo*, 823 F.2d at 1076. By virtue of our rulings with regard to Counts II and IV, the CHA is no longer a "prevailing party." As such, any amount awarded to the CHA as attorney's fees under § 1988 has

been rendered improper by our decision. Accordingly, we reverse the award of those amounts.

With regard to the award of sanctions under Rule 11, our recent decision in *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (en banc), establishes that the appropriate standard of review is "abuse of discretion." The district court's award of sanctions under Rule 11 was premised on two distinct findings. First, the district court concluded that Counts II and IV were "frivolous and not warranted by the law." The fact that we have remanded Counts II and IV to the district court for further proceedings, however, is strong indication that we do not consider these claims "frivolous and not warranted by the law." On the contrary, we find that in each instance Triad has made a "good faith argument for the extension . . . of existing law." As such, we conclude that the district court's award of Rule 11 sanctions based on this first premise was an "abuse of discretion." Accordingly, we reverse.

Second, the district court found that Triad and its attorneys failed to conduct an independent investigation of the factual allegations in Paragraphs 15(d) and (e) of its complaint and awarded sanctions on those grounds. With regard to this aspect of the district court's award of sanctions, we affirm. As was noted in *Mars Steel*, Rule 11 "is not a fee-shifting statute in the sense that the loser pays. It is a law imposing sanctions if counsel files with improper motives or inadequate investigation." 880 F.2d at 932. The district court below concluded, on the basis of unrebutted evidence, that Triad's allegations in Paragraphs 15(d) and (e) were advanced without the benefit of adequate factual investigation.[10] We decline to find such

[10] In ruling upon this motion for sanctions, the district court apparently relied upon the affidavits of Robert Whitfield and Wilbert Allen which directly contradict Triad's assertions in Paragraphs 15(d) and (e). These affidavits, submitted as part of the Appendix

(Footnote continued on following page)

a factual determination an "abuse of discretion" and, accordingly, we affirm this aspect of the district court's award of Rule 11 sanctions.

III. CONCLUSION

With regard to the substantive issues in Counts I through V of Triad's Amended Complaint, we affirm in part and reverse in part. Initially, we affirm the dismissal of Counts I and V. With respect to Counts II, III and IV, however, we reverse and remand for consideration consistent with this opinion.

In like manner, the district court's award of attorney's fees and sanctions under § 1988 and Rule 11 is affirmed in part and reversed and remanded in part. We reverse the district court's award of attorney's fees under § 1988 on Counts II and IV. With regard to the district court's award of sanctions under Rule 11, we reverse that portion of the award of sanctions attributable to the determination that Counts II and IV were "frivolous and not warranted by the law." That portion of the award of sanctions attributable to the "inadequate factual investigation" prong of Rule 11 is affirmed. Finally, we remand these

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[10] *continued*

to the CHA's "Memorandum in Support of Defendant's Motion to Dismiss," are beyond the scope of the pleadings to which the district court is confined in ruling upon the CHA's motion to dismiss. This fact, however, does not render them inappropriate for consideration in ruling upon the CHA's motion for Rule 11 sanctions. As we stated in *Szabo*, "[t]he violation of Rule 11 is complete when the paper is filed." 823 F.2d at 1077. With this fact in mind, it matters not whether the plaintiff's claim is subsequently disposed of on the merits, on a voluntary dismissal, or upon a motion to dismiss. The fact remains that Rule 11 has been violated and the plaintiff must expect to pay. *Cf. Id.* at 1077-79. As such, we conclude that the district court's consideration of these materials outside of the pleadings was not improper for the purposes of ruling on the CHA's motion for sanctions.

sanctions determinations to the district court for apportionment consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AMENDED: December 27, 1989

DECEMBER 26, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

TRIAD ASSOCIATES, INCORPORATED, doing business as GUARDIAN SECURITY, JK SECURITY SERVICES, INCORPORATED, and K & J MANAGEMENT, INCORPORATED,

Plaintiffs-Appellants,

Nos. 88-1353, 88-2830 & 88-2876

v.

CHICAGO HOUSING AUTHORITY, RENAULT ROBINSON, JAMES THOMAS, GEORGE CRAMER, WILBERT ALLEN, BRENDA GAINES and JOSEPH GARDNER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 87 C 5096—Charles P. Kocoras, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS, in accordance with the opinion of this Court filed this date. Each party to bear their own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 15, 1990.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

TRIAD ASSOCIATES, INC., d/b/a GUARDIAN SECURITY, J.K. GUARDIAN SECURITY SERVICES, INC. and K & J MANAGEMENT, INC.,

Plaintiffs-Appellants,

Nos. 88-1353, 88-2830 and 88-2876

v.

CHICAGO HOUSING AUTHORITY, RENAULT ROBINSON, JAMES THOMAS, GEORGE CRAMER, WILBERT ALLEN, BRENDA GAINES and JOSEPH GARDNER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 87 C 5096—Charles P. Kocoras, *Judge.*

ORDER

In its published opinion in this matter the court did not address the "MOTION TO DISMISS APPEAL NO. 88-2830 INSOFAR AS IT SEEKS TO APPEAL THE SANCTIONS ORDER ENTERED AGAINST ATTORNEY JOHN GUBBINS" filed by the Chicago Housing Authority, defendants, in this court on December 14, 1988. We take this opportunity to address that motion.

The district judge found that the plaintiffs and their attorneys violated Rule 11 with regard to Counts II and IV of the complaint. As a result sanctions were imposed, and plaintiffs and their attorneys were jointly ordered to pay attorneys fees and expenses of the defendants related to those allegations.

The Notice of Appeal of the district court's order imposing sanctions, dated September 19, 1988, reads in pertinent part:

> *Plaintiffs-appellants, Triad Associates, Inc., d/b/a Guardian Security, JK Guardian Security Services, Inc., and K & J Management, Inc.*, appeals the orders of the *Plaintiffs-appellants, Triad Associates, Inc., d/b/a Guardian Security, JK Guardian Security Services, Inc., and K & J Management, Inc.*, appeals the orders of the district court entered in this case June 15, 1988 and August 17, 1988 imposing sanctions jointly and severally against plaintiffs-appellants and their attorneys (emphasis added).

It is obvious from the emphasized portion of the foregoing language that neither Mr. Gubbins, nor any of plaintiffs attorneys, were included in the notice of appeal.

Federal Rule of Appellate Procedure 3(c) required that "the notice of appeal shall specify the party or parties taking the appeal . . . ." As we stated in *Rogers v. National Union Fire Ins. Co.*, 864 F.2d 557 (7th Cir. 1988),

"Rule 3(c)'s naming requirement is jurisdictional and inflexible. *Torres v. Oakland Scavenger Co.*, ____ U.S. ____, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988) . . . ." We went on to say in *Rogers* that "when a district court sanctions attorneys the attorneys are the real parties in interest, and the attorneys must appeal in their own names. A notice of appeal naming the party . . . as the appellant, not the attorneys, does not create jurisdiction over the attorneys' appeal."

It is, in fact, not clear that plaintiffs' attorneys intended to appeal the sanctions imposed against them. Mr. Gubbins did not respond to the defendants' motion to dismiss and the sanctions liability of plaintiffs' attorneys was not addressed in the briefs. Nevertheless, whether Mr. Gubbins or plaintiffs' attorneys intended to appeal is academic. We are without jurisdiction over the issue of sanctions entered against plaintiffs' attorneys relating to Counts II and IV of the complaint.

Accordingly, it is ORDERED that the motion of the CHA defendants to dismiss the district court's sanctions order, insofar as that order ran against Attorney John Gubbins, is GRANTED.

Furthermore, on consideration of the petition for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by the attorney for defendants/appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing and suggestions for rehearing *en banc*. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestions for rehearing *en banc* be, and the same are hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 87 C 5096 Date: January 27, 1988

Name of Assigned Judge: CHARLES P. KOCORAS

Case Title: Triad Associates, Inc. et al -v-
Chgo Housing Authority et al

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Enter Memorandum Opinion: Defendants' motion to dismiss is granted in its entirety, without prejudice to plaintiffs' right to refile the claims contained in Counts VI and VIII in state court.

* * * * *

(12) ☒ (For further detail see
☐ order on the reverse of
☒ order attached to
the original minute order form.)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 5096

TRIAD ASSOCIATES, INC., d/b/a GUARDIAN SECURITY, JK GUARDIAN SECURITY SERVICES, INC., and K & J MANAGEMENT, INC.,

Plaintiffs,

v.

CHICAGO HOUSING AUTHORITY, et al.,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is presently before the court on defendants' motion to dismiss and for partial summary judgment. For the reasons contained herein, defendants' motion to dismiss is granted and the motion for partial summary judgment is denied.

FACTS

Plaintiff Triad Associates, Inc., d/b/a Guardian Security ("Triad") is an Illinois corporation in the business of providing security, investigative and alarm services. Plaintiff JK Guardian Security Services, Inc. ("Guardian") is an Illinois corporation in the business of providing guard

services. Both corporations are owned by Messrs. James Malinowski and Kenneth Kotz, both of whom are white males. Plaintiff K & J Management, Inc. ("K & J") is an Illinois corporation which manages and administers the operations of plaintiffs Triad and Guardian.

Defendant Chicago Housing Authority ("CHA") is a municipal corporation whose purpose is to provide housing for low income persons. The CHA is governed by a seven member Board of Commissioners appointed by the Mayor of the City of Chicago. At all times relevant to the instant complaint, defendant Renault Robinson was the Chairman of the CHA Board having been appointed by the late Mayor Harold Washington. Defendants James Thomas and Wilbert Allen are attorneys who were members of the CHA Legal Department during the period in question. Defendant Joseph Gardner was the CHA's Deputy Executive Director for Tenant Services. Defendant George Cramer was the Deputy Executive Director of Finance and Administration at the CHA. Finally, defendant Brenda Gaines was appointed as the interim Executive Director of the CHA in January, 1987.

Triad first began providing security services for the CHA in 1982, apparently without benefit of a written contract. Plaintiffs allege that defendant Robinson, subsequent to his appointment as Chairman of the CHA board, "brought about the appointments" of defendants Thomas, Allen, Cramer, and Gardner pursuant to "his plan" to control all "CHA departments dealing with fiscal, procurement, budget, law, personnel, and data processing operations." Pl. Compl. at ¶ 12. Allegedly, these defendants then began "a campaign to intimidate and to drive . . . white contractors from the CHA and replace them with . . . black contractors who supported the political ambitions of defendant Robinson and the Washington Admin-

istration." *Id.*, at ¶ 13. Plaintiffs further allege that this "goal" was "adopted as a matter of policy for CHA operations," and that defendant Gaines has continued this policy. *Id.*

Pursuant to this alleged policy, plaintiffs contend that Robinson, with the aid of Cramer, Thomas, Gardner, and Allen, sought to replace plaintiffs with Digby Detective and Security Agency ("Digby") and GEJ Security ("GEJ"). Both firms allegedly supported the late Mayor Washington and his administration and, although not clearly stated, a fair inference drawn from the complaint is that both Digby and GEJ were owned by black persons.

In furtherance of their efforts to oust plaintiffs, defendant allegedly engaged in numerous tactics, including: (1) replacing Triad with Digby at CHA's senior housing operations on September 25, 1983, with only two-days notice; (2) falsely maintaining that Victor Vrdolyak (former Chicago Alderman Edward Vrdolyak's brother) owns and runs plaintiffs' businesses; (3) subjecting plaintiffs to extensive audits and inspections, including a November, 1984 on-site inspection, while not requiring black owned security firms to submit to similar audits; (4) blocking the award to plaintiffs of a CHA contract for security services following January, 1985 bidding until bid requirements could be lowered to permit Digby and GEJ to qualify thereunder; (5) upon rebid, awarding contracts to Digby and GEJ in addition to plaintiffs, although the bids of Digby and GEJ were the highest of all submitted; (6) attempting to prevent plaintiffs from undertaking the contract awarded them by requiring immediate posting of a performance bond and proof of insurance, while modifying the contracts of Digby and GEJ to allow additional time for compliance, and refusing to confirm the start date of plaintiffs' contract, although Digby and GEJ were given written con-

firmation; (7) assigning to Digby and GEJ numerous CHA developments and offices formerly serviced by plaintiffs at lower rates; (8) refusing to make timely payments to plaintiffs pursuant to their contract, while making more frequent and timely payments to Digby and GEJ; and, (9) reducing the amount of work performed by plaintiffs while maintaining the level of work performed by Digby and GEJ, although their rates are higher than plaintiffs.

Plaintiffs filed their seven-count complaint on June 5, 1987. In Count I, plaintiffs allege that defendants actions violated their rights to free association and speech as guaranteed by the First and Fourteenth Amendments and 42 U.S.C. § 1983. Plaintiffs allege in Counts II and III, respectively, that defendants actions also violated plaintiffs' rights to due process and equal protection of the laws, as guaranteed by the Fourteenth Amendment and § 1983. Count IV is brought pursuant to 42 U.S.C. § 1985(3) and alleges that defendants actions were taken pursuant to a conspiracy which was intended to and did deprive plaintiffs of their right not to be discriminated against on the basis of race and their First Amendment right to free association.

In Count V of their complaint, plaintiffs allege that since August 22, 1983, the individual defendants conspired to and have directed, conducted, and participated in the affairs of the CHA through a pattern of racketeering activity in violation of 18 U.S.C. §§ 1962(c) and (d). Plaintiffs contend that defendants repeatedly used the mail and telephone in furtherance of a scheme to defraud plaintiffs out of monies. The specific acts alleged are discussed *infra*. Finally, in Counts VI and VII respectively, plaintiffs allege tortious interference with contract and breach of contract pursuant to Illinois law.

Defendants now move to dismiss plaintiffs' complaint in its entirety pursuant to F.R.C.P. 12(b)(6) for failure to state a claim upon which relief may be granted. They have also moved for summary judgment on the allegations contained in ¶ 15(e) and (g) of plaintiffs' complaint. We decline, however, to convert this motion to dismiss the entire complaint to a motion for summary judgment as to only two sub-paragraphs. Therefore, in deciding this motion, we will consider only the sufficiency of the allegations contained in the complaint and none of the extrinsic materials proferred by defendants.

DISCUSSION

For purposes of a Rule 12(b)(6) motion to dismiss, all well-pleaded facts in the plaintiff's complaint must be taken as true. *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986). Additionally, the court must view these factual allegations together with reasonable inferences to be drawn from them in the light most favorable to the plaintiff. *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits. Thus, a motion to dismiss for failure to state a claim can be granted only if it appears beyond doubt that plaintiff could prove no set of facts entitling him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1265 (1986). When the complaint contains allegations of fraud, however, an additional pleading requirement is imposed. Due to the seriousness of such an accusation, F.R.C.P. 9(b) requires that "the circumstances constituting fraud or mistake . . . be stated with particularity" by the complain-

ing party. Fed.R.Civ.Proc. 9(b). With these standards in mind, we now turn to the merits of defendants' motion.

Defendants' first contention is that all of the claims contained in Counts I-IV, except those relating to the 1986 contract, are barred under the applicable two-year statute of limitation. *See Anton v. Lephamer*, 787 F.2d 1141 (7th Cir. 1986). Plaintiffs agree that a two-year statute of limitation period applies, and admit that several of the alleged acts occurred more than two years prior to filing their complaint. Plaintiffs contend that these claims are not barred, however, because they are plainly alleged to be part of an unlawful campaign of harrassment which began in 1983 and which continues to the present.

Plaintiffs have not cited any authority in support of applying a continuing violation theory to the facts of this case, and our research has uncovered none. Generally, a continuing violation arises in the context of unconstitutional *employment* discrimination. *See Pike v. City of Mission, Kan.*, 731 F.2d 655, 658 (10th Cir. 1984). In light of the great deference afforded claimants on a motion to dismiss, however, we will assume *arguendo* that a continuing violation theory is applicable in the context of alleged unconstitutional discrimination in the award and execution of public contracts.

In *Pike*, the Tenth Circuit succinctly described the continuing violation theory as follows:

> It is usually based on a showing that an employer continues to implement an illegal system or policy, such as race discrimination, that came into being prior to the limitations period. If employment decisions made under that policy result in constitutional violations within the limitations period, a continuing violation may be shown. A suit challenging a systematic policy is not barred even though the policy

> began before the limitations period, because the policy itself continues to violate employee's rights . . . However, a plaintiff may not use the continuing violation theory to challenge discrete actions that occurred outside the limitations period even though the impact of the acts continues to be felt.

Pike, 731 F.2d at 660. (internal citations omitted). In this case, plaintiffs have alleged that each of defendants' actions were taken in furtherance of defendants' purportedly unlawful policy of political and racial harassment against plaintiffs which continues to the present day. This allegation is sufficient to support plaintiffs' continuing violation theory for purposes of the present motion.

Counts I-III of plaintiffs' first amended complaint are brought pursuant to 42 U.S.C. § 1983. It is axiomatic that § 1983 confers no substantive rights itself, but merely a remedy for the deprivation of some right, privilege, or immunity secured by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979). In order to withstand a motion to dismiss, the § 1983 claimant must do more than merely parrot the language of the statute; the complaint must allege facts which, if believed, would show that the defendant was acting under color of state law and that his conduct deprived plaintiff of a right which is actually protected by the Constitution. *Evans v. Town of Watertown*, 417 F. Supp. 908 (D.C. Mass. 1976). In this case, plaintiffs have failed to allege such facts.

In Count I, plaintiffs have alleged that defendants' conduct deprived them of their rights to free association and speech as guaranteed by the First Amendment. Pl. Compl., at ¶ 18. Defendants contend that Count I is fatally defective because (1) the First Amendment does not prohibit a city's use of political criteria in awarding public con-

tracts; and, (2) plaintiffs failed to allege that they were engaged in any activity protected under the First Amendment at the time of the defendants' allegedly infringing actions. We agree.

Initially, we note that in fact plaintiffs' complaint does not contain any express factual allegation indicating that they were engaged in an activity protected under the First Amendment. However, an inference may be drawn from the totality of the allegations made in Count I that plaintiffs did not support the late Mayor Washington or his administration and that the alleged acts of defendants were in retaliation for plaintiffs' adverse political beliefs. Allowing plaintiffs the benefit of this inference, however, does not cure the defects of Count I. In *La Falce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), the court held that the First Amendment does not forbid the practice of favoring political supporters when awarding contracts for public projects. *Id.* Plaintiffs contend that *La Falce* is inapplicable to the instant case, because, unlike Mr. La Falce, they were successful bidders working under a secured contract at the time of the acts of which they complain. This distinction is unpersuasive.

In *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986), a majority of the Third Circuit relied on the *La Falce* decision in holding that independent contractors enjoy no First Amendment protection from termination based on political affiliation. *Id.*, at 669. In the instant case, plaintiffs do not even complain of termination, but merely a reduction in the amount of work performed. Under the terms of their contract, however, defendants expressly reserved the right to regulate the amount of work which plaintiffs might provide, including the right not to use plaintiffs' services at all. *See* "Protective Service Contract," Art.

3, Pl. Compl., Exhibit G. Clearly, plaintiffs cannot escape the teachings of *La Falce* and *Horn*. Since, under these facts, plaintiffs cannot state a First Amendment violation, they may not recover under § 1983 as alleged in Count I. Accordingly, defendants' motion to dismiss Count I is granted.

In Count II, plaintiffs allege that defendants' conduct violated their rights to due process of the law as guaranteed by the Fourteenth Amendment. Plaintiffs argue that they held a protectable property interest in the secured contract of which defendants deprived them by transferring work previously performed by plaintiffs to other firms, without cause or a hearing, and for constitutionally impermissable reasons. This claim must fail for several reasons.

First, affording plaintiffs every benefit to which they are entitled on a motion to dismiss, plaintiffs have not alleged a constitutionally protected property interest. "Only a 'legitimate claim of entitlement', [*Board of Regents v.*] *Roth*, 408 U.S. [564,] at 577, 92 S.Ct. [2701,] at 2709 [(1972)], an expectancy . . . that [is] legally enforceable," *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 778 n. 21 . . . (1980), is property." *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987). All of the defendants' alleged infringing actions relating to the 1986 contract were expressly allowed under that contract. *See* Pl. Compl., Exhibit G, Art. 1, 3, 4, 9, and 11. Thus, there simply was no deprivation of rights *secured* by that contract. Plaintiffs' complaints regarding the first round of bidding also fail to allege a protectable property interest. The Seventh Circuit has squarely held that "a disappointed bidder for a contract in Illinois lacks a property interest." *Szabo, supra*, at 1080, *citing, Coyne-Delany Co. v. Capital Development Board*, 616 F.2d 341

(7th Cir. 1980). In short, nothing contained in Count II can be fairly construed as a deprivation of something to which plaintiffs have a legitimate claim of entitlement. Therefore, plaintiffs cannot make out a claim under the Due Process Clause of the Fourteenth Amendment and Count II must be dismissed for failure to state a claim.

In Count III, plaintiffs allege that defendants' actions violated the Equal Protection Clause of the Fourteenth Amendment. In support of this theory, plaintiffs contend that Count III states a claim in that it contains allegations that defendants treated plaintiffs differently than similarly situated firms through an unconstitutional campaign of harrassment. The cases on which plaintiffs rely, however, involve public employees, rather than contractors, and thus are not controlling.

In order to properly plead a violation of the Equal Protection Clause enforceable under § 1983, plaintiffs must allege that a discriminatory intent or purpose was a motivating factor behind the official action. *See Acha v. Beame*, 438 F. Supp. 70, 79 (S.D.N.Y. 1977), *aff'd*, 570 F.2d 57 (2d Cir. 1978), *citing*, *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252 (1977). In this case, plaintiffs allege that defendants' "discriminatory" purpose was to "replace [white contractors] with . . . black contractors who supported the political ambitions of defendant Robinson and the Washington Administration." Pl. Compl., at ¶ 13. As discussed above, awarding or terminating public contracts on the basis of political affiliation is not a prohibited practice. Thus, the only basis for plaintiffs' claim is that they were treated less favorably on the basis of race. Clearly, these corporate plaintiffs cannot state a claim for racial discrimination.

The Supreme Court has expressly held that "a corporation . . . has no racial identity and cannot be the direct

target of . . . alleged [racial] discrimination." *Village of Arlington Heights*, 429 U.S., at 263. Although plaintiffs urge this court to disregard this statement as dicta, we decline. Since plaintiffs have failed to allege a discriminatory purpose as required to state a cause of action under the Equal Protection Clause and § 1983, Count III must be dismissed.

Plaintiffs bring Count IV pursuant to 42 U.S.C. § 1985(3) and allege that defendants' actions were taken pursuant to a conspiracy among defendants to deprive plaintiffs of their right not to be discriminated against on the basis of race and their right to free association as guaranteed by the First Amendment. To state a cause of action under § 1985(3), plaintiffs must allege: (1) a conspiracy of two or more persons; (2) who are motivated by a specific class based discriminatory animus; to, (3) deprive the plaintiff of equal enjoyment of rights secured by the law to all; (4) which results in injury to the plaintiff; (5) as a consequence of an overt act committed by the defendants in connection with the conspiracy. *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 828-29 (1983). In this case, plaintiffs cannot meet the second requirement. This requirement is only satisfied by alleging a "racial, class-based animus against 'Negroes and their supporters.' " *Grimes v. Smith*, 776 F.2d 1366 (7th Cir. 1985). Even if plaintiffs could properly allege a racial identity, which they cannot, § 1985(3) simply does not afford protection to "white corporations." Therefore, defendants' motion to dismiss Count IV is granted as well.

Plaintiffs bring Count V under 18 U.S.C. §§ 1962(c) and (d), the civil RICO statute. That statute provides, in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the

> activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections [sic] (a), (b), or (c) of this section.

18 U.S.C. § 1962.

In order to maintain an action under § 1962, plaintiffs must allege an injury to their business or property which was proximately caused by the conduct constituting the violation. 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, ____, 105 S.Ct. 3275, 3285-86 (1985); *Robinson v. City Colleges of Chicago*, 656 F. Supp. 555, 561 (N.D. Ill. 1987). "A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd.*, 473 U.S. 606, 105 S.Ct. 3291 (1985).

In the instant case, plaintiffs' RICO claim is essentially that they suffered economic injury due to: (1) misrepresentations contained in the bid proposals regarding the method of evaluation; (2) required conformance with certain contract provisions regarding time of execution and proof of insurance; and (3) reductions in the amount of work required of plaintiffs under the contract. The contract, which was incorporated into the complaint and attached thereto as Exhibit G, clearly reserves defendants' right to reduce the amount of work performed by plaintiffs, including the right not to use them at all. The contract also requires plaintiffs to meet execution deadlines and bond and insurance requirements. Thus, if plaintiffs suffered injury, it could not have been proximately caused

by these actions. The only remaining possibility is that plaintiffs' economic injury was the result of alleged fraud in the bidding process. It is worth noting that a large contract was awarded to the plaintiffs by virtue of their bid.

The facts of this case are very similar to those presented in *Robinson, supra,* 656 F.Supp. 555, and these plaintiffs, like Mr. Robinson, lack standing to assert their RICO claims. In their response, plaintiffs state that their injury is in "[not being] allowed to perform 100% on the contracts awarded them." Pl. Resp. at 30. However, like Mr. Robinson, plaintiffs' complaint fails to substantiate such a right. *See Robinson,* 656 F.Supp.at 561-62.

Defendants raise several other arguments regarding the insufficiency of the claims contained in Count V. It is not necessary to discuss them, however, because we find that these plaintiffs lack standing to assert those claims. Accordingly, defendants' motion to dismiss is also granted as to Count V. Since no federal claim now exists, Counts VI and VII, which arise exclusively under state law, must be dismissed for lack of pendent jurisdiction.

In conclusion, plaintiffs have failed to state any claim upon which relief might be granted in Counts I-IV. Additionally, plaintiffs are without a proximately caused injury, and thus, without standing to assert the civil RICO claim contained in Count V. Accordingly, defendants' motion to dismiss is granted in its entirety, without prejudice to plaintiffs' right to refile the claims contained in Counts VI and VII in state court.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: January 27, 1988

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Triad Associates, Inc. et al

v. Case Number: 87 C 5096

Chicago Housing Authority et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this cause is dismissed in its entirety, without prejudice to plaintiffs' right to refiled the claims contained in Counts VI and VII in state court.

Date January 27, 1988

H. STUART CUMMINGHAM
Clerk

/s/ _____
(By) Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-772

Chicago Housing Authority, et al.,

Petitioners

v.

Triad Associates, Inc., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 25, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 3rd day of May, 1990.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRIAD ASSOCIATES, INC., d/b/a GUARDIAN SECURITY, JK GUARDIAN SECURITY SERVICES, INC., and K & J MANAGEMENT, INC.,

Plaintiffs,

vs.

CHICAGO HOUSING AUTHORITY, RENAULT ROBINSON, JAMES THOMAS, GEORGE CRAMER, WILBERT ALLEN, BRENDA GAINES, and JOSEPH GARDNER,

Defendants.

No. 87 C 5096—Judge Kocoras
Jury Trial Demanded

FIRST AMENDED COMPLAINT

Plaintiffs Triad Associates, Inc., d/b/a Guardian Security, JK Guardian Security Services, Inc., and K & J Management, Inc., by their attorney John L. Gubbins, claim against defendants Chicago Housing Authority, Renault Robinson, James Thomas, George Cramer, Wilbert Allen, Brenda Gaines and Joseph Gardner as follows:

COUNT I

1. This action is brought pursuant to Section 1983 of Title 42 of the United States Code to remedy violations of the Fourteenth Amendment to the United States Constitution. Plaintiff also invokes the pendent jurisdiction of the Court over certain State of Illinois law claims. Jurisdiction is proper under 28 U.S.C. §1331 and 28 U.S.C. §1343.

2. Plaintiff Triad Associates, Inc. (hereinafter "Triad") is an Illinois corporation whose principal place of business is located in Chicago, Illinois. Triad is in the business of providing security, investigative and alarm services. James Malinowski and Kenneth Kotz are the owners of Triad. Both Malinowski and Kotz are white males. Triad's employees and supervisory staff is overwhelmingly black. Triad also does business under the properly registered assumed name of Guardian Security. Plaintiff JK Guardian Security Services, Inc. (hereinafter "Guardian") is an Illinois corporation whose principal place of business is located in Chicago, Illinois. Guardian is in the business of providing guard services. Guardian is also owned by James Malinowski and Kenneth Kotz and it was formed by them February 3, 1986. Plaintiff K & J Management, Inc. (hereinafter "K & J") is an Illinois corporation whose principal place of business is Chicago, Illinois. K & J manages and administers the operations of plaintiffs Triad and Guardian.

3. Plaintiff Triad first began providing security services for the CHA in the Spring of 1982. Initially, plaintiff Triad was requested to provide stationary guard services at certain CHA senior housing developments. Thereafter, CHA Chief of Security increased plaintiffs responsibilities to include the patrol of certain family housing developments.

The number of senior and family housing developments serviced by plaintiffs was gradually increased. Finally, plaintiff Triad was assigned the task of installing, monitoring and servicing all alarm systems in CHA administrative and office buildings and conducting sensitive investigations.

4. Defendant Chicago Housing Authority (hereinafter "CHA") is a municipal corporation incorporated under and subject to the laws of the State of Illinois. Its purpose is to provide safe, decent, and sanitary housing for low income people. Defendant CHA is governed by a seven member Board of Commissioners appointed by the Mayor of the City of Chicago.

5. Defendant Renault Robinson served until recently as Chairman of the CHA Board. In January, 1987, defendant Robinson resigned from the CHA Board and was replaced by Rev. B. Herbert Martin, Sr. Defendant Robinson was first elected CHA Board Chairman shortly after Harold Washington became Mayor of the City of Chicago and thereby took control of the CHA Board.

6. Defendants James Thomas and Wilbert Allen are members of the CHA Legal Department. Defendant Thomas is the General Counsel of the Legal Department. Defendant Allen is a member of defendant Thomas' staff. Both defendants Thomas and Allen are lawyers.

7. Defendant Joseph Gardner is the Deputy Executive Director for Tenant Services.

8. Defendant George Cramer until recently served as the Deputy Executive Director of Finance and Administration at the CHA.

9. Defendants Thomas, Cramer and Gardner during all relevant time periods reported directly to defendant Robinson and were supervised by defendant Robinson on the

day-to-day operations of CHA finances, administration and legal matters.

10. Defendant Brenda Gaines was appointed January, 1987, by the CHA Board as the interim executive director of the CHA. She replaced Zirl Smith who voluntarily resigned just prior to her appointment. Gaines is now charged with managing the day-to-day operations of the CHA.

11. Plaintiffs have for five years performed security services for the CHA and have discharged their obligations to the CHA with a high degree of professionalism, competency, and skill.

12. Subsequent to his appointment as Chairman of the CHA Board, defendant Robinson with the Board's knowledge and approval took direct control over CHA departments dealing with fiscal, procurement, budget, law, personnel and data processing operations. As part of his plan to maintain his control, defendant Robinson brought about the appointments of Thomas, Allen, Cramer and Gardner and worked with them to govern all aspects of CHA operations.

13. Among the goals defendants Robinson, Cramer, Thomas, Allen and Gardner set for the CHA and adopted as a matter of policy for CHA operations was a campaign to intimidate and to drive white employees and white contractors from the CHA and to replace them with black employees and black contractors who supported the political ambitions of defendant Robinson and the Washington Administration. Defendant Gaines since Robinson's resignation and her appointment has continued these policies.

14. Pursuant to defendants' racially and politically discriminatory policies, defendant Robinson with the agreement and assistance of Cramer, Thomas, Gardner and

Allen sought to terminate plaintiffs from performing further security services for the CHA, and to replace them with security firms which were owned by black persons who were political supporters of defendant Robinson and the Washington administration. The security firms with which defendants sought to replace plaintiffs were Digby Detective and Security Agency (hereinafter "Digby") and GEJ Security (hereinafter "GEJ"). Both Digby and GEJ are owned by Chicago policemen who for many years have been friends with defendant Robinson and on information and belief were and are members of the Afro-American Patrolmen's Association. Both Digby and GEJ were and are strong supporters of Harold Washington and his administration. From time to time Digby has provided security for Harold Washington during his political campaigning.

15. As part of their racially and politically discriminatory campaign against plaintiffs, defendants engaged in numerous acts of fraud and harassment against plaintiffs and continue such tactics to the present:

a. Shortly after he was elected CHA Board Chairman, Robinson planned with Digby to take over Triad's operations at CHA senior housing developments. On September 23, 1983, pursuant to their plan, Robinson acting as CHA Chairman gave plaintiff Triad two-day notice to cease its services at eighteen senior housing developments. Plaintiffs complied with Robinson's order and turned over senior housing operations immediately to Digby. Following the Digby takeover of the senior housing developments serviced by plaintiffs, defendants initiated plans to terminate plaintiffs from servicing other CHA security operations. The development of plans to restrict and eliminate plaintiff's

work for the CHA continues to the present. (Exhibit A)

b. Defendants engaged in a series of tactics to vilify plaintiffs and tie them to former Alderman Edward Vrdolyak. Defendant Robinson initiated investigations of plaintiffs directing CHA employees to inquire into the ownership of Triad. These investigations uncovered no linkage between plaintiffs and Edward Vrdolyak or his brother Victor. Nonetheless, defendant Robinson continues to assert both to news reporters, to members of the CHA Board, and to others that Vrdolyak headed plaintiffs' business. Robinson thereby justified Digby's takeover of CHA senior housing security operations and defendants' increasing efforts to terminate plaintiffs from all CHA work. To this day, defendant Robinson claims that Vrdolyak owns and runs plaintiffs' business. (Exhibit B, copies of articles from Chicago Defender newspaper).

c. In an effort to further intimidate and to embarass plaintiffs, defendants subjected plaintiffs to extensive audits and inspections. In November, 1984, CHA auditors during an on-site inspection did an intensive review of plaintiffs' business records. Plaintiffs were told by CHA employees that the audit was a "witch hunt" personally initiated by defendant Robinson. The audit uncovered no wrongdoing and in fact discovered that Triad had underbilled the CHA. Defendants have not required the black owned security firms to submit to similar audits. On information and belief, the audits of the black owned security firms was done cursorily by telephone.

d. Defendants blocked the award of a CHA contract for security services to plaintiffs. In January, 1985, plaintiffs participated in competitive bidding for CHA guard service operations. Their proposal was rated by Zirl Smith and CHA staff among the three best submitted and was recommended to the CHA Board for approval. (Exhibit C). Digby and GEJ failed to meet minimal bid standards. Upon Smith's recommendation the CHA Board voted to give plaintiffs a two year contract. (Exhibit D). Shortly thereafter, defendant Robinson blocked the award of a contract to plaintiffs and instead with the other defendants worked in collusion with Digby and GEJ to lower the bid requirements so that Digby and GEJ would qualify. The bid standards were lowered and the guard service contracts were subsequently rebid. Upon the rebid, plaintiffs were again successful but this time the proposals of Digby and GEJ were also found qualified and recommended for Board approval. Digby and GEJ's proposals included a higher rate for service than the rate proposed by all other companies including plaintiffs. Nonetheless, the CHA Board accepted the guard service proposals of Digby and GEJ as well as plaintiffs.

e. In an effort to prevent plaintiffs from undertaking the guard contract awarded them on their second bid, defendants fraudulently and maliciously created numerous barriers and delays. Among the barriers created for plaintiffs by defendants was the immediate posting of a performance bond. On September 10, 1986, defendant Cramer assisted by Allen and with the agreement and approval of defendant Robinson demanded plaintiffs immediately

post a $100,000 security bond and proof of insurance. (Exhibit E). No such ultimatum was given the black security firms. Plaintiffs complied on September 18, 1986 by posting the required bond and acknowledging the start of their contract. (Exhibit F). Subsequent to plaintiffs posting their performance bond, the defendants, however, modified the security contracts for Digby and GEJ allowing them further time to comply with the additional requirements defendants forced upon plaintiffs on September 10, 1986. On information and belief Digby and GEJ are to this date not in full compliance with the requirements set for the guard service contract. Also defendants refused to confirm, and to this date have never confirmed to plaintiffs the start date of their contract with the CHA. On the other hand defendants have provided written confirmation to the black firms. (A true and correct copy of plaintiffs' contract with the CHA is attached hereto as Exhibit G.)

f. Defendants have assigned to the black owned security firms numerous CHA developments and administrative offices for servicing even though the firms did not bid and were not awarded these sites. Many of these sites were formerly serviced by plaintiffs at rates lower than the rates now charged by the black firms. For instance, on December 1, 1986, defendant Gardner with defendant Thomas' approval instructed plaintiffs to relinquish their service operations at the CHA headquarters building even though plaintiffs had won that location by bid and it was included in their contract. Gardner gave the headquarters location to Digby. Digby had not bid for the headquarters building and there were

no complaints concerning plaintiffs performance while they provided security at CHA headquarters. (Exhibit H).

g. Defendants including defendant Gaines have fraudulently and maliciously refused to make timely payments to plaintiffs for the security services they render pursuant to their contract. Defendant CHA presently owes plaintiffs $780,000.00. Defendants have made more frequent and more timely payments to Digby and GEJ and have never allowed the arrearage to them to approach the level of monies now due plaintiffs.

h. Defendant Gaines with Thomas and Gardner have fraudulently and maliciously reduced the amount of security work to be performed by plaintiffs. The reductions are substantial and have caused severe hardship to plaintiffs' operations. Defendants have not reduced the amount of work required of the black security firms even though their hourly rates are higher than plaintiffs' and greater savings would be gained by reducing their operations.

16. At all times defendants were acting under color of state law.

17. As a result of defendants' conduct, plaintiffs have been severely injured losing substantial moneys in income and profits.

18. Defendants' discriminatory campaign against plaintiffs violated plaintiffs' rights to free association and speech as guaranteed by the First and Fourteenth Amendments and Section 1983 of Title 42 of the United States Code.

WHEREFORE, plaintiffs pray this Court to:

A. Grant them a declaratory judgment that the acts and practices of defendants complained of herein violate the provisions of 42 U.S.C. Sec. 1983 and the First Amendment;

B. Award plaintiff compensatory damages in the amount of $2,000,000.00, plus costs and attorneys fees;

C. Order the individual defendants to each pay plaintiffs punitive damages in the amount of $2,000,000.00;

D. Grant such further and other relief as may be just and equitable.

COUNT II

1. This civil action is brought under 42 U.S.C. Sec. 1983. The Court has jurisdiction over this claim under 28 U.S.C. Sections 1331 and 1343.

2-18. Plaintiff incorporates herein by reference paragraphs 1-17 of Count I as paragraphs 2-18 of Count II.

19. Defendants' actions against plaintiffs violated plaintiffs' rights to due process of law as guaranteed by the Fourteenth Amendment and 42 U.S.C. Sec. 1983.

WHEREFORE, plaintiffs pray this Court to:

A. Grant them declaratory judgment that the acts and practices of defendants complained of herein violate the provisions of 42 U.S.C. Sec. 1983 and the Fourteenth Amendment due process clause;

B-D. Plaintiff incorporates herein by reference prayers B, C, and D of Count I as prayers B, C, and D of Count II.

COUNT III

1. This civil action is brought under 42 U.S.C. Sec. 1983. The Court has jurisdiction over this claim under 28 U.S.C. Sections 1331 and 1343.

2-18. Plaintiffs incorporate herein by reference paragraphs 1-17 of Count I as paragraphs 2-18 of Count III.

19. Defendants' actions against plaintiff violated plaintiffs' right to equal protection of the law as guaranteed by the Fourteenth Amendment and 42 U.S.C. Sec. 1983.

WHEREFORE, plaintiffs pray this Court to:

A. Grant them declaratory judgment that the acts and practices of defendants complained of herein violate the provisions of 42 U.S.C. Sec. 1983 and the Fourteenth Amendment equal protection clause;

B-D. Plaintiffs incorporate herein by reference prayers B, C, and D of Count I as prayers B, C, and D of Count III.

COUNT IV

1. This civil action is brought under 42 U.S.C. Sec. 1985(3). The Court has jurisdiction over this claim under 28 U.S.C. Secs. 1331 and 1343.

2-18. Plaintiffs incorporate herein by reference paragraphs 1-17 of Count I as paragraphs 2-18 of Count IV.

19. In doing the acts and things above complained of, defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive plaintiffs of rights guaranteed to them under the Constitution and laws of the United States, as hereinafter enumerated.

20. Plaintiffs have been subjected, by the above recited acts, to the deprivation by defendants of rights, privileges and immunities secured to them by the Constitution and laws of the United States, particularly their right not to be discriminated against on the basis of race and their right to free association as guaranteed by the First Amendment.

WHEREFORE, plaintiffs pray this Court to:

A. Grant them a declaratory judgment that the acts and practices of defendants complained of herein violate the provisions of 42 U.S.C. Sec. 1985(3).

B-D. Plaintiffs incorporate hereby by reference prayers B, C, and D of Count I as prayers B, C, and D of Count IV.

COUNT V

1-17. Plaintiffs repeat and reallege paragraphs 1 through 17 of Count I as if set forth here in full.

18. The CHA is an enterprise as that term is defined in 18 U.S.C. §1961(4). Its activities affect interstate commerce.

19. Beginning on August 22, 1983 and continuing through the present, defendants Robinson, Gaines, Gardner, Thomas, Allen, and Cramer in violation of 18 U.S.C. §1962(c) and 1962(d) directed, conducted and participated in the affairs of the CHA through a pattern of racketeering activity as that term is defined in 18 U.S.C. §1961(5) and they have fraudulently and maliciously conspired to do so. Specifically, during the aforementioned time period, defendants repeatedly used the United States mail and interstate telephone wires in furtherance of a scheme to defraud plaintiffs out of monies in violation of 18 U.S.C. §1341 and 18 U.S.C. §1343.

20. Defendants Robinson, Gaines, Gardner, Thomas, Allen, Cramer and the CHA engaged in a scheme to defraud plaintiffs as set forth in paragraphs 1 through 17.

21. Beginning January 11, 1985, the individual defendants and the CHA at the direction of the individual defendants, made numerous misleading and false representations to plaintiffs that caused them to provide valuable services to the CHA and to expend substantial sums of money to bid for and to provide security service to the CHA.

22. These representations were designed by defendants to induce plaintiffs to use their experience, resources and knowledge in bidding for and in providing guard service, alarm systems and service, and investigatory services to the CHA.

23. These representations were all based in statements by the CHA to plaintiffs that their proposal for guard service contracts for the period April 1, 1985 through March 31, 1987 would be reviewed, evaluated, and rated according to plaintiffs' previous experience, capability to perform the services required and general, overall response to the CHA request for proposal, and that upon acceptance of the proposal, relations between plaintiffs and CHA would be governed by their protective service contract. (Attached hereto as Exhibit G).

24. At the time these representations were made by the defendants, the defendants did not possess a good faith basis to believe that plaintiffs proposal would be reviewed, evaluated and rated according to their experience, capability to perform and their overall response nor did defendants possess a good faith basis for the representations made in their protective service contract.

25. In fact, the individual defendants and the CHA made these false and misleading representations as a subterfuge to mask the excessive sums paid to GEJ and Digby as a reward for their support of defendant Robinson's political ambitions and Harold Washington and the Washington Administration.

26. The misleading and false representations and the events leading up to them are alleged in but not limited to those contained in paragraphs 15 a. through h. and the exhibits attached thereto.

27. The services rendered by plaintiffs are contained in but not limited to those contained in paragraphs 3 and 11 Exhibit G.

28. The patterns of racketeering activity are predicated on acts of mail fraud, 18 U.S.C. §1341, and wire fraud, 18 U.S.C. §1343. Defendants have participated in and conducted the affairs of the enterprise in a pattern of racketeering activity by committing the following specific acts:

A. On January 11, 1985, by United States mail, the CHA sent plaintiffs a *Request for Proposal, Number GS-1-85, Guard Service for Various Chicago Housing Authority Developments* to fraudulently induce plaintiffs to provide the CHA with their bid proposal. Attached to the *Request for Proposal* was attached a Specification for Guard Services which included among its instructions the fraudulent representations that the proposer would be judged on the bid cost and on previous experience, capability to provide the desired service and overall response to the *Request for Proposal*. Plaintiffs bid successfully and they with Wells-Fargo Guard Service and Hawk Detective Service were initially designated to receive contracts by CHA Board resolution. Defendants then fraudulently and maliciously blocked the execution of the protective service contract.

B. On April 23, 1985, by United States mail the CHA sent plaintiffs a second *Request for Proposal Number GS 2-85 Guard Service for Various Chicago Housing Authority Developments*. Certain of the individual defendants including Robinson brought about requirements alteration of the bid so that GEJ and Digby could qualify. Plaintiffs again bid successfully. GEJ and Digby, however, active fraudulently in collusion with Robinson and other defendants received the award of the senior housing locations. The senior housing security operations are less hazardous, less demanding, and require the least expenditures of resources for equipment and support. Nonetheless GEJ and Digby were both awarded contracts even though their rates were the highest of all other bidders.

C. On February 26, 1986, defendant Allen was in contact with plaintiffs by use of interstate telephone wires, and fraudulently represented that GEJ and Digby had executed and were in full compliance with the CHA protective service contract requirements.

D. On March 14, 1986, defendant Allen, by United States mail, sent a three day deadline for plaintiffs to execute the altered protective service contract. Defendant Allen threatened to offer their locations to other security firms unless plaintiffs executed the service contract. Plaintiffs reluctance to execute the service contract tendered by the CHA was due to the fact that defendants had altered the insurance requirements thus making the procurement of insurance extremely difficult to obtain and very expensive.

E. On August 22, 1986, by United States mail, the CHA notified plaintiffs to terminate their services at certain family housing locations. The security work for these certain locations was assumed by GEJ on August 25, 1986.

F. On September 10, 1986, defendant Cramer, by United States mail, threatened plaintiffs with termination unless they produced proof of properly executed bond and proof of insurance by September 18, 1986. Defendant Cramer's request was unreasonable but at great expense plaintiffs complied by the date set. GEJ and Digby were given no such deadline and were not in compliance as of September 18, 1986, and on information and belief are not now in full compliance.

G. On December 1, 1986, defendant Gardner, by United States mail, notified plaintiffs that their "security personnel be pulled from CHA's Central Office". Digby now has responsibility for Central office security. Defendant Gardner further stated that plaintiff's protective service contract would be amended. No amendment has ever been effected.

H. On February 16, 20, and 23, plaintiffs by use of interstate telephone wire were in contact with the CHA concerning defendant CHA's failure to pay plaintiffs under the terms of their protective service contract for services satisfactorily performed. The CHA made numerous false assurances and representations that past due invoices, some a year old would be paid on February 23, 1987 just prior to the Democratic primary election. These false representations were done with the approval of defendants Gaines and Gardner and were made to prevent any adverse criticism of Harold Washington and his running of the CHA prior to the Democratic primary. No payment was received on February 23, 1987 and to date plaintiffs have invoices totalling $780,000 due them. Certain of these invoices extend back to June, 1986.

I. On April 27, 1987, the CHA by interstate telephone wire contacted plaintiffs and instructed them to reduce the daily number of guards providing security throughout

family housing. Defendant CHA fraudulently represented the lack of funds for security as the reason for reduction in guard service. The CHA has not reduced the daily number of guards serving senior housing serviced by GEJ and Digby who charge higher hourly rates for less demanding work. The CHA has also made more frequent and more current payments to GEJ and Digby.

29. The acts described in paragraphs 1-26 constitute violations of 18 U.S.C. §§ 1962(c) and 1962(d) by defendants.

30. Plaintiffs have been injured in their businesses and property by reason of the defendants above-described violations of 18 U.S.C. §§ 1962(c) and 1962(d). These injuries include those described in paragraph 17 above and substantial expenditures for purchases of vehicles, radios, and tools as well as substantial sums spent for rental of unnecessary garage space, for insurance, and other items such as salaries, bank costs, good will and reputation.

WHEREFORE, plaintiffs pray that this court enter judgment in its favor and award compensatory damages in excess of Three Million Dollars ($3,000,000) trebled in excess of Nine Million Dollars ($9,000,000) and award plaintiffs costs and reasonable attorneys fees.

COUNT VI

1. Plaintiffs bring this claim for tortious interference with contracts under the law of the State of Illinois. Plaintiff invokes this court's pendent jurisdiction to hear this claim.

2.-18. Plaintiff incorporates by reference Paragraphs 1 through 17 of Count I as Paragraphs 2 through 18 of Count V.

19. Plaintiff Triad had contracted with defendant CHA to provide it with security services. (A full copy is attached hereto as Exhibit G). Plaintiff Triad has performed fully and satisfactorily according to the terms of the contract.

20. Subsequent to and because of defendants the actions of Robinson, Gaines, Cramer, Gardner, Thomas and Allen acting in concert with Digby and GEJ the CHA has breached its contract with plaintiff resulting in a great economic loss to it. The actions of defendants leading to CHA's breach are enumerated in paragraph 16 of this Count and include the loss of monies for bills past due as well as for lost profits and other damages.

WHEREFORE, plaintiff seeks compensatory damages in the amount of $2,000,000 and punitive damages in the amount of $3,000,000.

COUNT VII

1. This action is brought pursuant to the common law of the State of Illinois regarding contract. Plaintiff invokes this Court's pendent jurisdiction to hear this claim.

2.-18. Plaintiffs incorporate herein paragraphs 1 through 17 of Count I as paragraphs 2 through 18 of Count VI.

19. Plaintiff Triad has contracted with the defendant CHA to provide security services. Plaintiff has contracted with the CHA for guard service. (A true and complete copy of the Protective Service Contract is attached hereto as Exhibit G). Plaintiff has also through purchase order contracted the CHA to provide alarms and related services. Plaintiff has performed fully and satisfactorily under all its contract with the CHA.

20. The course of actions set forth herein in paragraph 16 constitutes a breach of the contract between the CHA and plaintiff Triad.

21. Due to the CHA's breach of the contract between itself and plaintiff, plaintiff Triad has suffered severe monetary losses.

WHEREFORE, Plaintiff Triad prays that this Court:

A. Enter a declaratory judgment that defendant CHA breached the contract between plaintiff and itself.

B. Award plaintiff damages for plaintiff's losses coming as a result of defendant's breaches of the contract.

C. Award such other relief as this Court may deem just and proper.

Respectfully submitted,

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[Exhibits omitted in printing.]

Supreme Court, U.S.
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No. 90-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHICAGO HOUSING AUTHORITY, RENAULT ROBINSON, JAMES THOMAS, GEORGE CRAMER, WILBERT ALLEN, BRENDA GAINES, and JOSEPH GARDNER,

Petitioners,

VS.

TRIAD ASSOCIATES, INC., d/b/a GUARDIAN SECURITY, JK GUARDIAN SECURITY, INC., and K & J MANAGEMENT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's remand of the issue of corporate racial identity conflicts with the decisions of any other circuit or this Court?

2. Whether the Seventh Circuit's holding that white corporations may claim the protection of 42 U.S.C. § 1985(3) conflicts with the decisions of any other circuit or this Court?

3. Whether the Seventh Circuit's remand of Triad's due process claim conflicts with the decisions of any other circuit or this Court?

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SUPREME COURT OF THE UNITED STATES
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CHICAGO HOUSING AUTHORITY,
RENAULT ROBINSON, JAMES THOMAS,
GEORGE CRAMER, WILBERT ALLEN,
BRENDA GAINES, and JOSEPH GARDNER,
Petitioners,

v.

TRIAD ASSOCIATES, INC., d/b/a GUARDIAN
SECURITY, JK GUARDIAN SECURITY, INC.,
and K & J MANAGEMENT, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Triad Associates, Inc., JK Guardian Security, Inc. and K & J Management, Inc. (collectively "Triad") respectfully request that this Court deny the petition for a writ of certiorari.

Petitioners Chicago Housing Authority, Renault Robinson, James Thomas, George Cramer, Wilbert Allen, Brenda Gaines and Joseph Gardner (collectively "CHA") have utterly failed to justify a grant of certiorari in this case. The CHA has succeeded only in mischaracterizing both the decision below and using that mischaracterization to create an artificial tension with rulings made by this Court and the other circuits.

As demonstrated herein, no tension exists. A fair reading of the Seventh Circuit's opinion indicates that, although the Seventh Circuit strongly suggests the proper resolution of this case, there has not been a definitive substantive ruling on the issues of corporate racial identity or due process. In addition, the decision is in no respect inconsistent with the rulings of this Court or other circuits. There are no issues appropriate for this Court's review.

The case, which to date has not progressed beyond petitioners' challenge of the pleadings, should be permitted to return to the district court for further proceedings and full development of the factual record. Only then will it become clear whether a review by this Court is either necessary or appropriate.

I.

THE SEVENTH CIRCUIT'S REMAND OF THE ISSUE OF CORPORATE RACIAL IDENTITY DOES NOT REQUIRE REVIEW BY THIS COURT

The CHA argues, first, that "[t]he Seventh Circuit decided the issue of corporate racial identity in a manner that conflicts with this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977)" and, second, that "[t]his Court's ruling in *Croson v. City of Richmond*, ___ U.S. ___, 109 S.Ct. 706 (1989), is inapposite to the issue of corporate racial identity raised here." (Pet. at 6-7, 10)[1] As demonstrated below, both contentions lack merit.

The CHA's argument in regard to *Arlington Heights* is based on a false premise. The Seventh Circuit did not decide that corporations can have a racial identity; instead, it ruled that *Arlington Heights* does not foreclose such a holding. The Seventh Circuit's conclusion that the Supreme Court did not resolve the question is confirmed by the express language of *Arlington Heights:* "[b]ecause of the presence of [an individual plaintiff]," the Court opted "not [to] consider whether the other individual and corporate plaintiffs have stand-

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1 References to the Appendices to the Petition are cited as "App.," and references to the Petition are cited as "Pet."

ing to maintain the suit." *Arlington Heights,* 429 U.S. at 264, n. 9. The panel stated that there is an "absence of a definitive ruling from the Supreme Court on this issue," and recognized the existence of post-*Arlington Heights* cases that "have held that a corporation may have standing to allege racial discrimination." (App. A at 15) The Seventh Circuit "remand[ed] [the case to the district court for] consideration in light . . . of [this] precedent." Thus, there is no conflict between the opinion below and *Arlington Heights.* (App. A at 15)

The CHA again mischaracterizes the decisions of the appellate court and this Court in arguing that the Seventh Circuit improperly considered *Croson.* The CHA contends that *Croson* "is irrelevant to this case because no government enacted set-aside program is involved here which would provide a basis for the racial classification of corporations." (Pet. at 10) First, the Seventh Circuit did not, as the CHA argues, rely solely on *Croson* as an alternative basis for its ruling. (Pet. at 8) While clearly suggesting the proper result, the Seventh Circuit eschewed a definitive ruling and instead cited numerous post-*Arlington Heights* cases, *Croson* among them, which suggest "that a corporation *may have standing* to allege racial discrimination."[2] (App. A at 15) (emphasis added) Conspicuous by its absence from the CHA's brief is any case that conflicts with this limited disposition.

Moreover, *Croson* is entirely relevant to this case. There, the Court struck down the City of Richmond's minority set-aside law on grounds that the statute violated the equal protection clause because it "denie[d] certain citizens the opportunity to compete for a fixed percentage of public contracts *based solely upon their race.*" *Croson,* 109 S.Ct. at 721 (emphasis added). The lone plaintiff challenging the Richmond Plan as racially discriminatory was a corporation, the J.A. Croson Company. The inescapable implication of these facts is that a corporation can have a racial identity for purposes of the equal

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2 The CHA mischaracterizes both *Hudson Valley Freedom Theater, Inc. v. Heimbach,* 671 F.2d 702, 706 (2d Cir.), *cert. denied,* 459 U.S. 857 (1982) and *Marshall v. Kleppe,* 637 F.2d 1217, 1220 (9th Cir. 1980), each of which either explicitly or implicitly supports the idea that a court may ascribe a racial identity to a corporation based on the race of its owners.

protection clause and the civil rights laws; otherwise, J.A. Croson would have lacked the standing necessary to raise such a claim.[3] The Seventh Circuit therefore was correct when it ruled that *Croson* and other cases at a bare minimum compelled further scrutiny of Triad's allegations.

The CHA argues that if "the Court has left the issue of the racial identity of corporations undecided for resolution in another case, this case now specifically raises this issue and certiorari should be granted to eliminate any uncertainty." (Pet. 8, n. 3) The mere fact that corporate racial identity is part of this case does not make it appropriate for Supreme Court review. Absent a definitive ruling or a conflict, the corporate racial identity issue provides no basis for granting certiorari.

II.

THE SEVENTH CIRCUIT'S RULING ON THE PROTECTION OF WHITE CORPORATIONS UNDER SECTION 1985(3) DOES NOT PRESENT A QUESTION APPROPRIATE FOR REVIEW

The CHA argues that the Seventh Circuit has disregarded its own precedent, that of other circuits and this Court's line of reasoning in ruling that a white corporation may be entitled to the protection of

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3 Indeed, there is reason to believe, as the panel strongly suggested (App. A at 15), that a court can ascribe race to a corporation. It is well-established, for instance, that corporations are fully protected by the equal protection clause. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562, 574 (1949) (Jackson, J.). Moreover, the CHA's suggestions to the contrary notwithstanding, neither the structure of a corporation, particularly a corporation like Triad, which was small and had only two shareholders, nor the volatility of the business world presents any obstacle to this conclusion. First, the separation of a corporation and its owners exists to insulate stockholders from liability for corporate acts and thereby encourage investment in productive enterprises, Henn and Alexander, *Corporations* §73, p. 130 (3d ed. 1983), not to prevent companies from relying on the Constitution to defend themselves against discrimination. Second, since a court ascribing race to a company need look to the race of corporate ownership *only at the time* of the discrimination, subsequent changes in ownership do not bar the assertion of a corporate racial identity.

§1985(3). Again, the CHA strains to create conflicts that simply do not exist.

First, the CHA has cited no case in which any court has ruled that either a white person or a white corporation is unprotected by §1985(3). In fact, the Seventh Circuit has explicitly extended § 1985(3) protection to persons discriminated against on the basis of sex, religion, ethnicity and political views. *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988). Other circuits have followed suit. *New York State Nat'l. Org. for Women v. Terry*, 886 F.2d 1339 (2nd Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990) (women are a protected class under § 1985(3)); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (political affiliation with racial overtones); *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (members of the Unification Church); *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) (protection not foreclosed to "new" classes).

The Seventh Circuit's decision has not created a conflict among the circuits. The cases from other circuits cited by the CHA, while denying protection, merely require that §1985(3) cases be brought by members of classes with "discrete and insular" characteristics. *See, e.g., Terry*, 886 F.2d at 1359; *McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987); *National Communication Sys. v. Michigan Pub. Serv.*, 789 F.2d 370, 374 (6th Cir.), *cert. denied*, 479 U.S. 852 (1986); *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985). The "classes" found to be unprotected by these circuits were either not well-defined, *McLean*, 817 F.2d at 1219 (scapegoats are not a well-defined class); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176-77 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (handicapped is not a well-defined class); created after the tort had occurred, *Buschi*, 775 F.2d at 1258 (whistleblowers); or were groups whose attributes did not provoke the animus against the plaintiff, *Harrison v. Brooks*, 519 F.2d 1358, 1360 (1st Cir. 1975). The Seventh Circuit's holding that Triad may be protected is consistent with both its precedent and that of other circuits.

Second, unable to point to an actual conflict with a case decided by this Court, the CHA instead claims that the Seventh Circuit

"disregards . . . this Court's clear line of authority." (Pet. at 12) In neither of the two cases cited by the CHA did this Court rule that §1985(3) did not extend to white corporations. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in which the Court considered a civil rights action brought by blacks, the Court expressly stated that "there must be *some* racial, or perhaps otherwise class-based, invidiously discriminatory animus . . . ." *Griffin*, 403 U.S. at 102 (emphasis added). In *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), the Court held that discrimination for economic reasons cannot be redressed under the statute. The Seventh Circuit's decision conflicts with neither case.

In fact, this Court has applied the Civil Rights Statutes as broadly as their language implies. *Griffin*, 403 U.S. at 97. Section 1981, for instance, has been applied to protect whites in addition to non-whites. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). The plain language of §1985(3) states that *any person* or *class of persons* deprived of the equal protection of the laws may recover damages. This language does not limit §1985(3) to blacks.[4] To hold otherwise would be inconsistent with other civil rights statutes. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . ." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978). The Seventh Circuit's decision is consistent with this precedent.

The §1985(3) issue is not appropriate for review. In addition to the possibility that future developments in the district court might render the issue moot, the Seventh Circuit's treatment of white corporations under §1985(3) does not conflict with the precedent of this Court or any circuit.

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4 A full perusal of the legislative history behind § 1985(3) would lead to a broad interpretation. *Scott*, 463 U.S. at 845-53 (Blackmun, J., dissenting). Congress's intent was not solely to protect blacks, but all classes whose beliefs or associations placed them in danger of not receiving equal protection of the law from local authorities.

III.

THE SEVENTH CIRCUIT'S REMAND OF THE DUE PROCESS ISSUE DOES NOT REQUIRE REVIEW BY THIS COURT

The CHA contends that the Seventh Circuit's due process analysis is "in conflict with the decisions of other Circuits" and "open[s] every public contract breach to a due process claim." (Pet. at 16-17) Both contentions are erroneous on their face.

First, although the Seventh Circuit's opinion strongly suggests a due process violation, the Court did not decide finally whether Triad suffered any denial of due process. Rather, the panel articulated the flawed analysis of the district court, specifically the district court's failure to consider the imposition of a duty of good faith under Illinois contract law, and then remanded the issue "for full consideration consistent with this opinion." (App. A at 13)

Second, and contrary to the CHA's contention otherwise, the Seventh Circuit's finding of a possible due process violation is limited in two distinct respects. Initially, the Seventh Circuit explicitly limited its holding: ". . . our decision today is necessarily limited to situations in which the applicable state law implies a 'duty of good faith' into the contract . . ." (App. A at 12, n.6) Beyond this implied duty of good faith, moreover, the decision below is further limited by the facts of this case, where improper racial and political considerations underlie the bad faith. The CHA's improper use of racial and political criteria in breaching the contract places this case far outside the realm of typical breach of contract cases.

In arguing that the Seventh Circuit's decision reaches every public contract, the CHA fundamentally mischaracterizes Triad's due process claim as based solely on an allegation that there was "a reduction in the number of hours Triad was paid under its contract . . ." (Pet. at 16) This mischaracterization of Triad's claim, which wholly ignores the political and racial animus underlying the CHA's breach, undermines the CHA's contention that the Seventh Circuit's decision is inconsistent with the due process decisions of other circuits. None of the cases cited by the CHA involved contract

breaches motivated by racial or political animus. The only rule arising from the cases cited is that "the Due Process Clause is invoked to protect something more than an ordinary contractual right." *S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962, 966 (2nd Cir. 1988). Put slightly differently, no due process claim arises where ". . . the only basis for federal jurisdiction is that a state actor is one of the contracting parties." *Ramsey v. Board of Educ. of Whitley County, Ky.*, 844 F.2d 1268, 1273 (6th Cir. 1988). The peculiar facts of this case, as the Seventh Circuit explicitly reasoned, implicate a great deal more than an ordinary breach of a contract right; rather, the allegation here is of bad faith in the form of racial and political animus by a municipal corporation.

What the Seventh Circuit did was to find a possible due process violation arising from the unique reality of the CHA's racial and political motivation in breaching Triad's contract. There is no need for this Court to review this limited holding.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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